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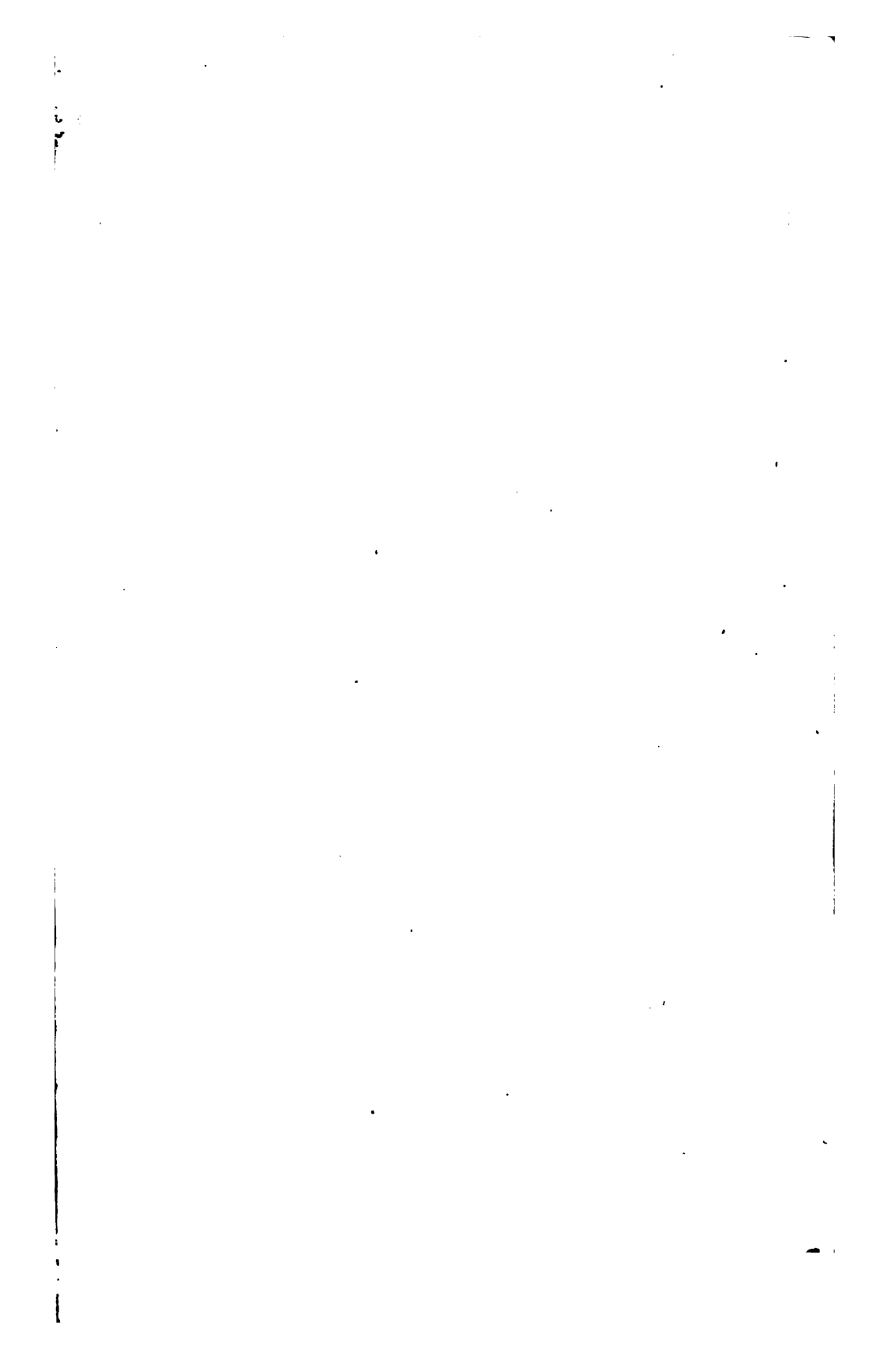
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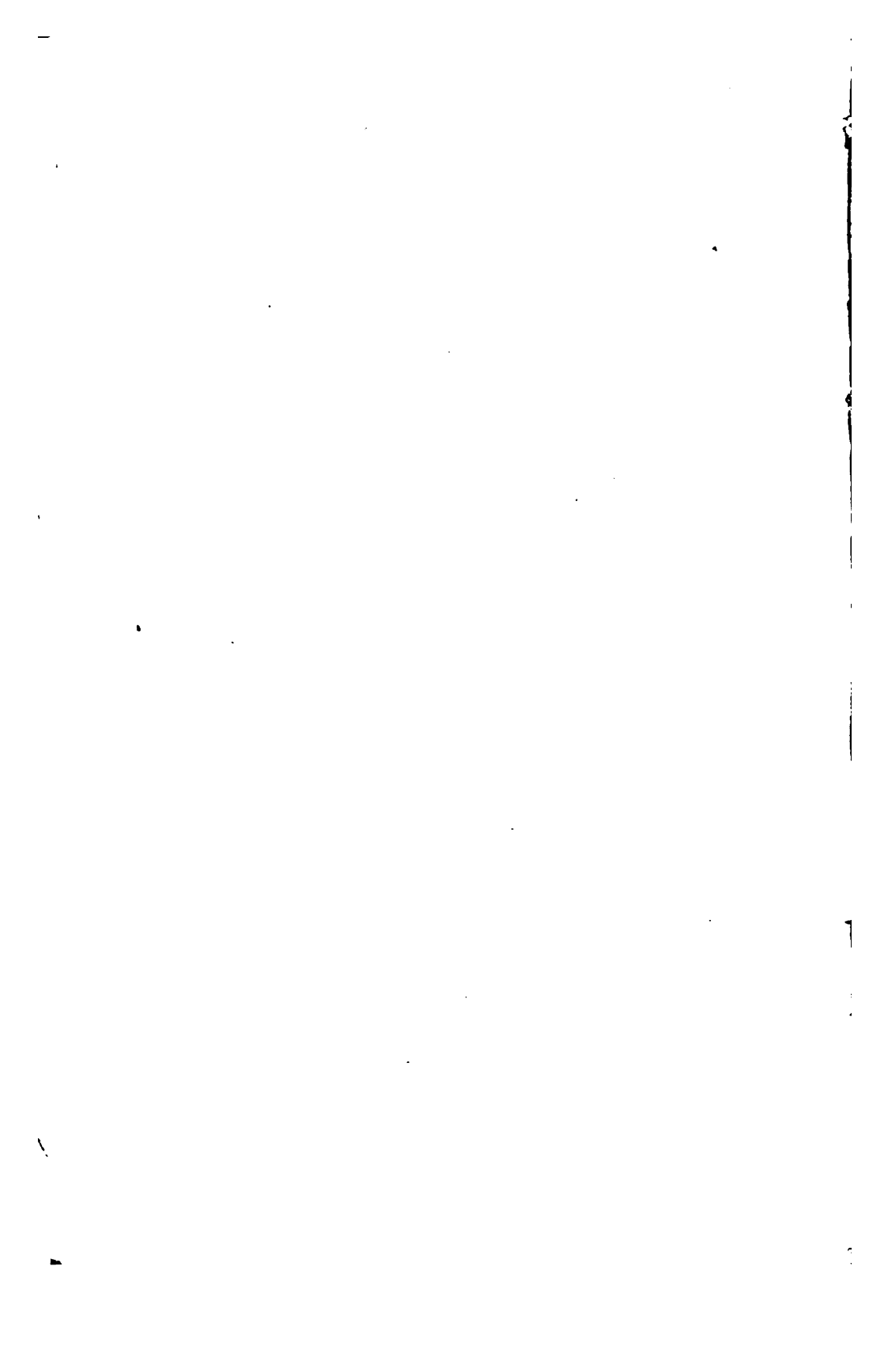
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VOL. 27—ILLINOIS AP-
PELLATE REPORTS.

27 17	27 166	27 346	27 511
35 26	27 303	130 49	35 246
35 633	32 631		40 346
40 334	35 23	27 351	133 265
126 289	35 573	38 306	
		40 534	27 518
27 22	27 173		30 93
126 416	126 461	27 256	40 422
		126 533	126 613
27 26	27 174		
23 451	40 363	27 375	27 533
127 9		35 694	33 234
	27 189	126 378	37 170
27 29	127 568		40 312
126 556		27 384	
	27 814	33 418	27 538
27 30	126 189		131 547
126 605		27 399	
	27 220	27 416	27 546
27 43	37 580		126 64
127 438	40 308	27 391	
	120 28	37 603	27 556
27 63			37 339
124 473	27 238	27 401	37 538
	40 539	40 534	
27 68			27 573
120 621	27 254	27 404	33 638
	126 478	126 274	
27 76			27 500
126 611	27 265	27 410	126 509
	33 186	27 480	
27 88		27 555	27 566
35 36	27 270	27 573	40 93
120 562	33 503	33 250	
		35 183	27 610
27 91	27 275		127 449
126 493	33 391	27 419	
	126 408	35 563	27 621
27 93			126 166
127 153	27 288	27 433	
	27 504	33 688	27 634
27 114	126 631		35 231
35 115		27 438	
	27 303	30 120	27 638
27 119	35 573	126 138	35 276
35 437			
37 168	27 303	27 456	27 643
	37 519	35 149	126 266
			126 551
27 121		27 487	
126 401	27 313	37 467	27 651
	33 443	126 386	35 414
27 145			30 228
127 406	27 320		
	35 176	27 489	
27 148		40 323	
126 301	27 324		
	27 330	27 493	
27 151		37 607	
35 537	27 336		
37 202	33 646	27 500	
	126 68	37 545	
27 159			
33 473	27 339	27 506	
	120 631	30 40	
		33 265	





5
30
11
Dec 18 19

REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS.

VOLUME XXVII.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FIRST DISTRICT IN
APRIL, MAY, JUNE, JULY, AUGUST, SEPTEMBER AND DECEMBER,
1888; IN THE SECOND DISTRICT IN MAY, 1888.

REPORTED BY
EDWIN BURRITT SMITH,
OF THE CHICAGO BAR.

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DURING THE TIME OF THESE REPORTS.

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THOMAS A. MORAN, <i>Judge</i> ,	- - - - -	Chicago.
JOSEPH E GARY, <i>Judge</i> ,	- - - - -	Chicago.
JOHN J. HEALY, <i>Clerk</i> ,	- - - - -	Chicago.

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LYMAN LACEY, <i>Judge</i> ,	- - - - -	Havana.
DAVID J. BAKER, <i>Judge</i> ,	- - - - -	Cairo.
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FOURTH DISTRICT.

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N. J. PILLSBURY, <i>Judge</i> ,	- - - - -	Pontiac.
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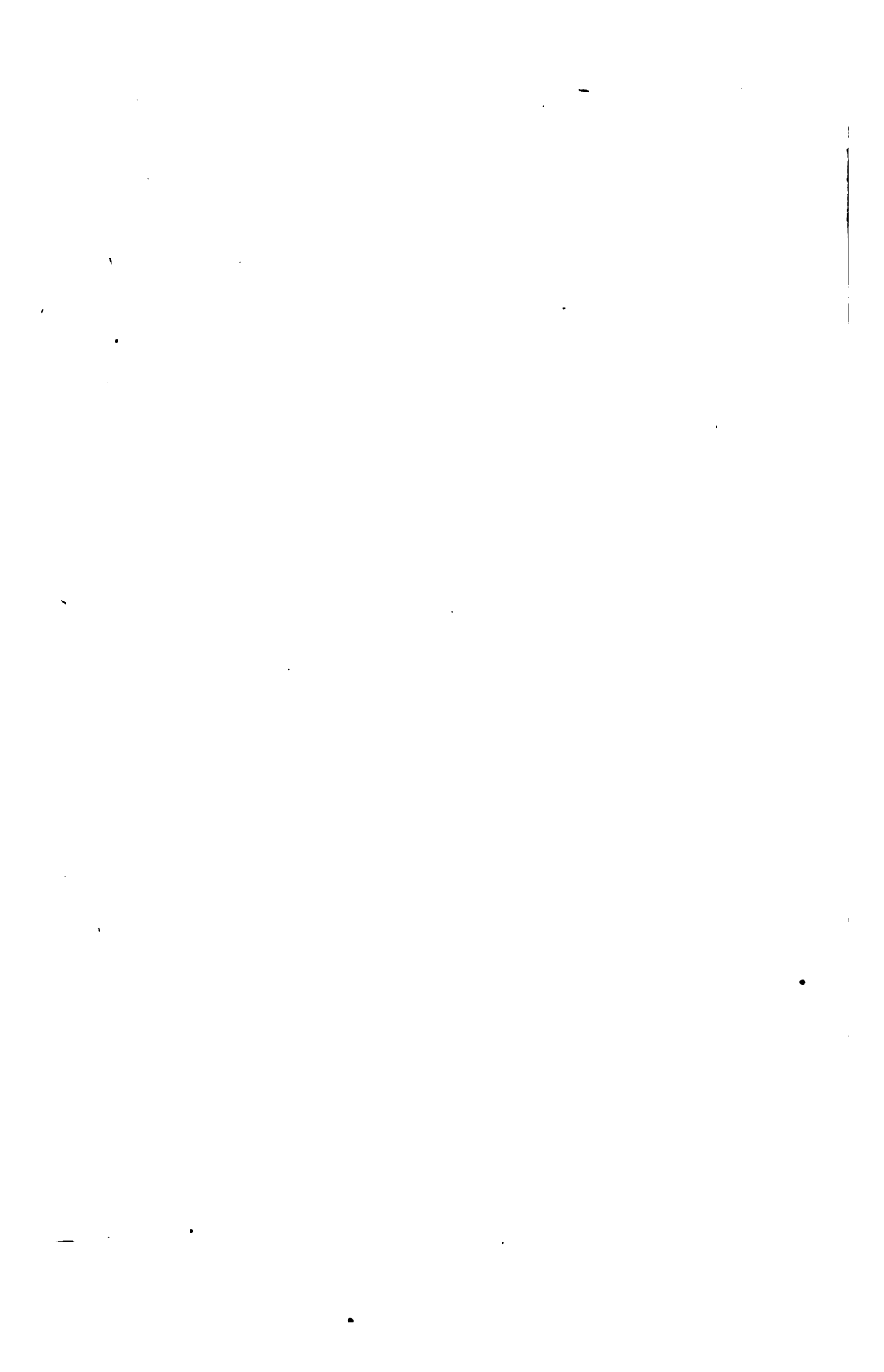


TABLE OF CASES.

A

Adams v. Cross Wood Printing Co.....	313
Alexander v. N. W. Masonic Aid Ass'n.....	29
Alling v. Brazee.....	59
Alling v. Wenzell.....	511
American Ex. Nat. Bk., Mechanics Loan & Trust Co. v.....	154
American Exch. Nat. Bk. v. Chicago Nat. Bk.....	538
Ames v. Moir & Co.....	88
Andrews v. Boedcker.....	30
Andrews v. Chandler.....	103
Atkinson v. Foster.....	63

B

Bain, Chamberlain v.....	634
Baker, Nat. Bank of Ill. v.....	356
Baldwin, Hunt v.....	446
Barnes, In re.....	151
Bates v. Sandy.....	552
Bensley v. Brockway.....	410
Berdel, Reich v.....	265
Billigh, Wetenkamp v.....	585
Birmingham Fire Ins. Co. of Pittsburg v. Pulver.....	17
Bishop. McGillis v.....	53
Blanchard v. L. S. & M. S. Ry. Co.....	22
Boas, Rosenthal v.....	430
Boedecker, Andrews v.....	30
Boyden, Horner v.....	573
Brabrock, Van Ingen v.....	401
Bradner, Smith & Co., Curran v.....	582
Brazie, Alling v.....	595
Brockway, Bensley v.....	410
Brooke v. O'Boyle.....	384
Brown, Gurney v.....	640
Brown v. Tuttle.....	389
Buckley, Hanchett v.....	159
Bulkley v. Devine.....	145
Butt v. Lee.....	419

C

Campbell v. Campbell.....	309
Carpenter, Watson v.....	492
Carter, Story v.....	287
Chamberlain v. Bain.....	134
Chandler, Andrews v.....	103
Chaplin v. Highway Com'rs.....	634
Chapman v. Chapinan.....	487
Chapman, Village of Jefferson v.....	43
Chase, Scribner v.....	36
Chicago & A. R. R. Co. v. Suffern.....	404
Chicago Bd. of Trade, N. Y. Chi. Grain & Stock Exch. v.....	93
Chicago City Ry. Co. v. Gillam.....	386
Chicago City Ry. Co. v. Robinson.....	26
Chicago Dock Co., Davis v.....	569
Chicago Gas Light & Fuel Co. v. Town of Lake.....	346
Chicago, M. & St. P. Ry. Co. v. Maher.....	24
Chicago, M. & St. P. Ry. Co. v. Mason.....	450
Chicago, M. & St. P. Ry. Co. v. Snyder.....	476
Chicago Nat. Bk., Am. Exch. Nat. Bk. of Chicago v.....	538
Chicago & N. W. Ry. Co. v. Dunleavy.....	438
Chicago & N. W. Ry. Co. v. Johnson.....	351
Chicago & N. W. Ry. Co., Wright v.....	200
Chicago Safe and Lock Co. v. Cremen.....	331
City of Chicago v. Enright.....	559
City of Chicago v. Farrell.....	526
City of Chicago, Marquis v.....	251
City of Chicago v. Reed.....	482
City of Chicago, The People v.....	217
City of Lake View, Goudy v.....	505
City of Rockford v. Falver.....	604
Clark v. Wilson.....	610
Cline, Pederson v.....	249
Commercial Union Assurance Co., Scammon v.....	74
Connecticut Mut. Life Ins. Co., Windett v.....	68
Cooper v. Johnson.....	504
Corcoran v. The People.....	638
County of Cook, Gibbons v.....	213
Cravener v. Hule.....	275
Cremen, Chicago Safe and Lock Co. v.....	331
Cross Wood Printing Co., Adams v.....	313
Cunningham v. Wright.....	334
Curran v. Bradner, Smith & Co.....	582
Curran v. Pullman Palace Car Co.....	572
Curtis v. Williams.....	311
Curtis v. Williams.....	493

TABLE OF CASES.

11

D

Dalv, Touhy v.....	459
Davies v. Phillips.....	387
Davis, Humphreville v.....	142
Davis v. Chicago Dock Co.....	569
De Golyer v. W. U. Tel. Co.....	489
Devine, Bulkley v.....	145
Dietz v. Schmidt.....	114
Doktor, Viskocil v.....	232
Doyle v. Munster.....	130
Dunleavy, C. & N. W. Ry. Co. v.....	438

E

Eggers v. Hanchett.....	429
Enright, City of Chicago v.....	559
Epps, Foster v.....	235
Evans v. The People.....	616

F

Fadner v. Filer.....	506
Falver, City of Rockford v.....	604
Farrell, City of Chicago v.....	526
Fergus v. Lohman.....	448
Ferry, Kramer v.....	479
Filer, Fadner v.....	506
Fire Ass'n of Philadelphia, Towne v.....	433
Firemen's Ins. Co. v. Peck.....	91
First Nat. Bank of Chicago, Northrop v.....	527
Fisher, Sheer, v.....	465
Foster, Atkinson v.....	63
Foster v. Epps.....	235
Francis, Siemens-Lungren Gas Illuminating Co. v.....	303
Free Home Association, Payette v.....	307
French, Willer v.....	76

G

Gastka, North Chicago City Ry. Co. v.....	518
Gattman, Hamburg Am. Packet Co. v.....	182
Germania Life Ins. Co. of N. Y. v. Klewer.....	590
Gibbons v. County of Cook.....	213
Gibbs, Osborne v.....	246
Gillam, Chicago City Ry. Co. v.....	386
Gossett v. Union Mut. Accident Ass'n.....	266
Goudy v. City of Lake View.....	505
Gould v. Warne.....	651
Grace, Keeler v.....	427
Gregory, Richardson v.....	621
Gurney v. Brown.....	640

H

Hale, Cravener v.....	275
Hamburg American Packet Co. v. Gattman.....	182
Hamburgher Co. v. Levy.....	570
Hanchett, Eggers v.....	429
Hanchett v. Buckley.....	159
Hass v. The People.....	416
Hayden v. Hoxie.....	533
Herrick, Morrison v.....	339
Herting, Wistar v.....	443
Hews v. Wall.....	445
Hide & Leather Nat. Bk. v. Rehm.....	172
Highway Com'rs, Chaplin v.....	634
Hochstadter, Martin v.....	166
Horner v. Boyden.....	573
Horton, Verling v.....	263
Hosmer v. Teller.....	488
Hoxie, Hayden v.....	533
Humphreville v. Davis.....	142
Hunt v. Baldwin.....	446
Hunter v. Mathewson.....	192
Hustis v. Pickands.....	270
Hyers, Lambert v.....	400

I

Illinois Mut. Ins. Co. v. Mette.....	330
In re Barnes.....	151

J

James T. Hair Co. v. Thorne.....	502
Johannes v. Kielgast.....	576
Johnson, Cooper v.....	504
Johnson, C. & N. W. Ry. Co. v.....	351
Joyce, Spear v.....	457
Judah, Webster v.....	294

K

Keeler, Kellogg v.....	244
Keeler v. Grace.....	427
Kelley, Thomas v.....	491
Kellogg v. Keeler.....	244
Kendall v. Young.....	174
Kielgast, Johannes v.....	576
Klages, Kolb v.....	631
Kleine, Mueller v.....	473
Klekr, Turner v.....	391
Klewer, Germania L. Ins. Co. of N. Y. v.....	590
Kolb v. Klages.....	631
Kramer v. Ferry.....	479

L

Lake S. & M. S. Ry. Co., Blanchard v.....	22
Lambert v. Hyers.....	400
Lapp v. Pinover.....	169
Larkin, Ricker v.....	625
Lee, Butt v.....	419
Levy, Hamburger Co. v.....	570
Lewis v. Reticker.....	601
Lohman, Fergus v.....	448
Lord & Thomas, McDonald v.....	111

M

Maher, C., M. & St. P. Ry. Co. v.....	24
Mantonya, Turner v.....	500
Martin v. Stubbins.....	121
Martin, Swift v.....	117
Martin v. Hochstadter.....	166
Marquis v. City of Chicago.....	251
Mason, C., M. & St. P. Ry. Co. v.....	450
Mathewson, Hunter v.....	192
McDonald v. Lord.....	111
McGillis v. Bishop.....	53
Mechanics Loan & Trust Co. v. American Ex. Nat. Bk.....	154
Mellen, N. Y. & Chi. Grain & Stock Ex. v.....	556
Merki, Sweet v.....	245
Metropolitan Gas Co v. Village of Hyde Park.....	361
Mette, Ill. Mut. Ins. Co. v.....	331
Mette, Security Ins. Co. v.....	324
Michaelis, Wolf v.....	336
Moir & Co., Ames v.....	88
Moran, Start v.....	119
Morrison v. Herrick.....	339
Mueller v. Kleine.....	473
Muller, Swantz v.....	320
Munster Doyle, v.....	130
Murphy, Roby v.....	394
Myers v. Union Nat. Bank.....	254

N

National Bank of Ill. v. Baker.....	356
New Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade.....	93
New Y. & Chi. Grain & Stock Exch. v. Mellen.....	556
Niehoff, Sullivan v.....	421
Nix v. Whiteside.....	463
North Chicago City Ry. Co. v. Gastka.....	518
Northrop v. First Nat. Bank of Chicago.....	527
North W. Masonic Aid Ass'n, Alexander v.....	29

O

O'Boyle, Brooke v.....	384
Osborne v. Gibbs.....	246

P

Payette v. Free Home Association.....	307
Peck, Firemen's Ins. Co. v.....	91
Pederson v. Cline.....	249
People v. City of Chicago.....	217
People, Hass v.....	416
Phillips, Davies v.....	387
Phillips, South Park Commissioners v.....	380
Pickands, Hustis v.....	270
Pinover, Lapp v.....	169
Plumb v. Taylor.....	238
Pullman Palace Car Co., Curran v.....	572
Pulver, Birmingham Fire Ins. Co. v.....	17

R

Reed, City of Chicago v.....	482
Rehm, Hide & Leather Nat. Bk. v.....	172
Reich v. Berdel.....	265
Reticker, Lewis v.....	601
Richardson v. Gregory.....	621
Ricker v. Larkin.....	625
Robinson, Chicago City Ry. Co. v.....	26
Roby v. Murphy.....	394
Roche, Skakel v.....	423
Rosenthal v. Boas.....	430

S

Sanders v. Seelye.....	288
Sandy, Bates v.....	552
Sankey v. Seipp.....	299
Scammon v. Com. Union Assurance Co.....	74
Schiller, Welling v.....	284
Schmidt, Dietz v.....	114
Schneider v. Turner.....	220
Scribner v. Chase.....	36
Security Ins. Co. v. Mette.....	324
Seelye, Sanders v.....	288
Seipp, Sankey v.....	299
Skakel v. Roche.....	423
Sheer v. Fisher.....	465
Siemens-Lungren Gas Illuminating Co. v. Francis.....	303
Snyder, C., M. & St. P. Ry Co. v.....	476
South Park Commissioners v. Phillips.....	380
Spear v. Joyce.....	457
Star & Crescent Milling Co. v. Thomas.....	137

TABLE OF CASES.

15

Start v. Moran.....	119
Stelzich v. Weidel.....	177
Stone, Williamson v.....	214
Story v. Carter.....	287
Strong v. Strong.....	148
Stubbins, Martin v.....	121
Suffern, C. & A. R. R. Co. v.....	404
Sullivan v. Niehoff.....	421
Swantz v. Muller.....	320
Sweet v. Merki.....	245
Swift v. Martin.....	117

T

Taylor Co., Winona Paper Co. v.....	558
Taylor, Plumb v.....	238
Taylor v. Warren.....	655
Teller, Hosmer v.....	428
The Dorsett Pipe & Paving Co., Winston v.....	546
The People, Corcoran v.....	638
The People, Evans v.....	616
The People, Watson v.....	493
Thomas, Star & Crescent Milling Co. v.....	137
Thomas v. Kelley.....	491
Thorne, James T. Hair Co. v.....	502
Touhy v. Daly.....	459
Town of Lake, Chi. Gas Light & Fuel Co. v.....	346
Towne v. Fire Ass'n of Philadelphia.....	433
Turner, Schneider v.....	220
Turner v. Klekr.....	391
Turner v. Mantonya.....	500
Tuttle, Brown v.....	389

U

Umlauf v. Umlauf.....	375
Union Mut. Accident Ass'n, Gossett v.....	266
Union Nat. Bank, Myers v.....	254

V

Van Ingen v. Brabrock.....	401
Verling v. Horton.....	263
Village of Hyde Park, Metropolitan Gas Co. v.....	361
Village of Jefferson v. Chapman.....	43
Viskocil v. Doktor.....	232

W

Wall, Hews v.....	445
Warne, Gould v.....	651
Warren, Taylor v.....	655
Watson v. Carpenter.....	492

Watson v. The People.....	493
Webster v. Judah.....	294
Weidel v. Stelzich.....	177
Welling v. Schiller.....	234
Wenzell, Alling v.....	511
Western U. Tel. Co. v. De Golyer.....	489
Wetenkamp v. Billigh.....	585
Whiteside, Nix v.....	463
Willer v. French.....	76
Williams, Curtis v.....	311
Williams, Curtis v.....	498
Williamson v. Stone.....	214
Willing v. Schiller.....	284
Wilson, Clark v.....	610
Windett v. Conn. Mut. L. Ins. Co.....	68
Winona Paper Co. v. W. O. Taylor Co.....	558
Winston v. The Dorsett Pipe & Paving Co.....	546
Wistar v. Herting.....	443
Wolf v. Michaelis.....	336
Woltz, World's Soap Mfg. Co. v.....	302
World's Soap Mfg. Co. v. Woltz.....	302
Wright, Cunningham v.....	334
Wright v. C. & N. W. Ry. Co.....	200

Y

Young, Kendall v.....	174
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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1887.

THE BIRMINGHAM FIRE INSURANCE COMPANY OF
PITTSBURG

V.

EMILIE PULVER, FOR USE, ETC.

*Fire Insurance—Amount of Loss—Notary's Certificate—Evidence—
Opinion of Witnesses—Cross-Examination—Discretion—Remarks of Trial
Judge—Instructions.*

1. In an action on a policy of fire insurance the amount of loss is a question for the jury, and the recovery is not limited to the amount stated as the loss in the notary's certificate.

2. The opinion of a witness as to the quantity of the goods burned, formed from an inspection of the debris, is inadmissible.

3. The court may, in its discretion, confine counsel within reasonable limits in the cross-examination of witnesses.

4. In the case presented, certain inadvertent remarks of the trial judge in ruling upon objections, did not operate to the injury of the appellant and do not constitute such error as to require a reversal.

5. It is a matter of discretion with the court to give instructions cautioning the jury against prejudice toward one party, or favor to the other.

6. Appellant can not complain of the refusal of the court to give instructions asked, when every material issue in the case was fully and properly submitted to the jury by instructions prepared by the court.

[Opinion filed June 13, 1888.]

(17)

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MESSRS. MOSES & NEWMAN, for appellant.

MESSRS. KRAUS, MAYER & STEIN, for appellee.

MORAN, P. J. The judgment from which this appeal is prosecuted was rendered against appellant on a policy of insurance. The case was tried by a jury, and upon all the issues there was a bitter contest.

It is very strongly urged upon us that the verdict is against the evidence, and that this court should reverse the case without remanding it. We have examined the record with care, and find evidence tending to support the contention of appellee on every issue of fact raised in the case. There is, it is true, a conflict of evidence, but where there is such conflict, the verdict of the jury must be treated as settling it in favor of the successful party, and this court is not authorized to interfere with such verdict unless some error of law has intervened, or unless such verdict is manifestly against the weight of the evidence. We can not say that the verdict rendered in this case is against the weight or preponderance of the evidence. There are many errors of law assigned, and, while we have examined each, and carefully considered the argument of counsel in support of their contentions, we shall not attempt to discuss all their points in detail, but shall notice briefly such as appear to be chiefly relied on.

The policy sued on insured appellee to the amount of \$1,000, and she held two other policies for \$1,000 each on the property covered and alleged to have been destroyed. The assured claims her loss to be upward of \$3,800. The policy required the assured to furnish a certificate from a magistrate or notary public, stating the amount of loss which such officer verily believed the assured had sustained on the property insured.

Appellee furnished a certificate of a notary attached to the proof of loss, in which said notary certified that the insured

“sustained by the fire loss and damages on the property insured to the amount of \$1,000, as stated in the foregoing proof of loss.” In the proof of loss appellee stated the amount of her loss to be \$3,886.95, as shown by a schedule. It was contended on the trial, and is urged here, that the notary’s certificate controlled as to the amount that could be recovered under the policy, and as the proof of loss disclosed that there were two other policies on the same property, appellant was liable under the pro-rating clause only for one-third of the \$1,000 certified by the notary to be the loss. We have been referred to no authority in support of counsel’s position, and we are aware of no principle on which it can be sustained. The certificate is furnished as a compliance with the condition of the policy, but statements contained in it in no manner conclude either the assured or the company. There is no magic in such a certificate and it creates no estoppel as against either party. Even if the proof of loss proper had contained the statement, under the oath of the assured, that the loss was \$1,000, she would not be precluded from showing on the trial that the loss was greater. The amount of the loss is, on the trial, a question for the jury under all the evidence, and there is no rule of law that limits the recovery to the amount stated as the loss in the notary’s certificate, or in the proofs of loss. *Miaghan v. Hartford Fire Ins. Co.*, 24 Hun, 58; *Lebanon Mutual Ins. Co. v. Kepler*, 106 Pa. St. 28.

It was sought by appellant on the trial to introduce in evidence the opinions of certain witnesses as to whether it was probable, judging from the appearance of the debris after the fire, that such a quantity of goods could have been burned as appellee claims was burned. This evidence was excluded by the court, and, as we think, properly. Inferences from facts are not for the witness, but for the jury. Proof of the amount and appearance of the debris, and all other conditions manifest upon the premises after the fire was proper, but the conclusions to be drawn from such appearance was entirely for the jury. The evidence sought to be introduced was not upon a matter within the domain of opinion or expert evidence, but related to a subject within the common knowledge and experience of men.

Complaint is made of the course of the trial judge, in interfering with the cross-examination of some of the witnesses and because of remarks made in ruling on points in reply to arguments of counsel. The cross-examinations were in some instances inordinately extended, and it is in the discretion of the court to confine counsel within reasonable limits. We have found no abuse of such discretion in this case. While "patience and gravity of hearing is an essential part of justice," the judge has the direction of the trial and is much better able to perceive what is unnecessary than counsel who is engaged in a heated contest with the witness.

The remarks or comments of the court, mainly complained of, were made in ruling upon objections, and are statements that the evidence upon certain points was thus and so. The admissibility of evidence offered frequently depends upon the evidence already introduced, and it is not unusual for the court in ruling to allude to such evidence as is in the record to make his meaning plain. This, of course, should be done in such a manner as to express no opinion as to what such evidence proves. Owing to the regard which is paid by jurors to the opinion of the judge, he should use great caution in expressing his opinion on any question which it is the province of the jury to determine. But every unguarded expression of the Judge in stating reasons to counsel for his rulings, can not be treated as a ground for granting a new trial. To do so would be to greatly embarrass the administration of justice. The jury were told that they were the judge of the weight of the evidence, and of the credibility of the witnesses, and were given the usual instructions as to the preponderance of the evidence; and from the whole course of the trial, no doubt, thoroughly understood that it was their province to determine what were the facts established by the evidence.

We are of opinion that the inadvertent remarks of the court did not, in fact, operate to the injury of appellant, and do not constitute such error as to require us, for that reason, to reverse this case.

Appellant submitted some nineteen instructions to be given to the jury, but the judge refused to give said instructions,

and also refused appellee's instructions, and gave to the jury instructions drawn by himself. Appellant contends that the court erred in refusing its instructions. We have been at some pains to examine the instructions refused in connection with the instructions which the court gave in lieu of them, and while the court did not, by his instructions, cover every point in detail which appellant covered in the instructions requested, we are of opinion that every material issue in the case was fully and properly submitted to the jury by the court and that they were fairly and clearly instructed as to all questions of law.

Many of appellant's instructions were correct propositions of law, and might have been given by the court, but appellant can not complain of the refusal to give them, as the same propositions were contained in the instructions given by the court. Some of appellant's propositions, which the court failed to incorporate in his instructions, might have been given, but they are of such a nature that error can not be predicated on the omission to give them. It is matter of discretion with the court to give instructions cautioning the jury against prejudice toward one party, or favor to the other, and the giving or refusal of instructions of that class can not be assigned for error.

We are of opinion, upon the whole record, that there is no error which requires a reversal of the judgment, and it will, therefore, stand affirmed.

Judgment affirmed.

ROLLIN P. BLANCHARD, ADM'X,
V.
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY.

Limitations—Additional Count—Error without Prejudice—Railroads—Personal Injury—Action for Damages—Former Appeal.

1. An additional count in which the plaintiff's cause of action is merely re-stated does not warrant a plea of the statute of limitations, although filed after the time limited for the commencement of the suit.

2. This court will not reverse for an error which worked no injury to the appellant.

3. In an action against a railroad company to recover damages for causing the death of the plaintiff's intestate, wherein this court upon a former appeal adjudged the plaintiff to have been a trespasser, it is *held*: That the evidence fails to show negligence on the part of the defendant so great as to amount to wanton and willful misconduct; and that the court properly directed a verdict for the defendant.

[Opinion filed April 11, 1888.]

APPEAL from the Superior Court of Cook County; the
Hon. JOHN P. ALTGELD, Judge, presiding.

MESSRS. THOMAS DENT and WILLIAM P. BLACK, for appellant.

This court held in *Haynie v. C. & A. R. R. Co.*, 9 Ill. App. 105, that "a plaintiff may re-state his cause of action by way of amendment, without its being obnoxious to the objection of introducing a new cause of action."

The additional count was but a re-statement of the cause of action for which the suit was brought, and was not obnoxious to the objection of introducing a new cause of action. In fact, the statute on which the action is based gave but one right of action, and the additional count referred to this and no other cause of action; and for this reason the additional count could properly be filed without being subject to the bar of the statute. *Dickson v. C. B. & Q. R. R. Co.*, 81 Ill. 217.

The plaintiff was entitled to have the case put to the jury upon the question whether his intestate exercised ordinary care under all the circumstances, and was also entitled to have the case put to the jury as to whether the action of the railroad company should not be deemed gross negligence or willful and unlawful misconduct. *Chicago & E. I. R. R. Co. v. Hedges*, Adm'r, 105 Ind. 398; *Byrne v. New York Central & H. R. R. Co.*, 104 N. Y. 362; *Cassida v. Oregon Ry. & Navigation Co.*, 13 Pacific Rep. 438. The railroad company should be estopped to allege that the plaintiff's intestate was a trespasser.

It was for the jury to determine whether there was a want of ordinary care on the part of the plaintiff under the evidence as presented. "Negligence is not a legal question, but is one of fact." *Great Western R. R. Co. v. Haworth*, 39 Ill. 353.

The trial court was not authorized to instruct the jury to find for the defendant, unless the plaintiff's testimony was "wholly insufficient, considering all it proved or tended to prove." *Holmes v. C. & A. R. R. Co.*, 94 Ill. 444.

MR. PLINY B. SMITH, for appellee.

Per Curiam. This case was in this court before, and is reported in the 15th Ill. App. 582. The facts of the case were very fully stated in the opinion then rendered, and it is not deemed necessary to re-state them here.

When the case was re-docketed in the court below, plaintiff obtained leave to file an additional count to the declaration. To this additional count defendant filed a plea of the statute of limitations, which plea was demurred to by plaintiff, and the demurrer was overruled by the court, and judgment entered for defendant on said plea. A trial was had upon the other counts of the declaration, and at the conclusion of the plaintiff's evidence, the judge instructed the jury to find a verdict for the defendant. We agree with the counsel for appellant that the additional count filed was nothing more than a re-statement of plaintiff's cause of action, and was not in any sense the statement of a new cause of action.

It follows that the statute of limitations was not a good plea to said additional count, and that the court erred in overruling the demurrer to it. But that error can not avail appellant, because he was not injured by it.

It is not claimed that all the evidence which appellant had was not introduced. Therefore, if his evidence does not make a case which entitles him to a verdict, an error depriving him of an appropriate pleading does not injure him.

The former judgment of this court left no ground on which the plaintiff could recover, unless he should furnish proof that the accident was the result of negligence on the part of defendant so gross as to be wanton and reckless misconduct, equivalent in legal contemplation to a willful tort.

We are of opinion that plaintiff wholly failed to introduce any evidence from which the jury would be at liberty to find any such degree of negligence. The facts seem to us to be the same in all respects as they were when the case was before considered in this court, and the law as then stated must control now.

The court below properly instructed the jury to find for the defendant, and the judgment must be affirmed.

Judgment affirmed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY

V.

JOHN MAHER.

Railroads—Injury at Highway Crossing—Evidence—Instructions.

In an action against a railroad company to recover damages for injuries to himself and to his horse and wagon at a highway crossing, this court affirms the judgment of the court below, the verdict being fairly supported by the evidence and there being no substantial error committed by the court.

[Opinion filed May 16, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. E. WALKER, for appellant.

The Supreme Court has held, as a matter of law, that when persons are about to cross a railroad track it is their duty to use all their faculties to discover the approach of a train, not only by listening but by looking. *Chicago & N. W. Ry. Co. v. Gersten*, 15 Ill. App. 614.

This is not only the rule of the Supreme Court of our State, but also of the Supreme Courts of other States, notably of New York and Pennsylvania. *T. W. & W. R. W. Co. v. Miller*, 76 Ill. 278; *Railroad Company v. Henderson*, 43 Pa. St. 449; *Meyers v. I. & St. L. Ry. Co.*, 113 Ill. 386.

Messrs. McELHERNE, for appellee.

Per Curiam. This is an appeal from a judgment recovered by appellee in an action brought by him against appellant for injuries to himself, and to his horse and vehicle, sustained by being run into by a locomotive engine being driven by the servants of appellant, at the intersection of Wood Street with appellant's railway tracks in the city of Chicago.

The verdict is fairly supported by the evidence, but it is contended that the court erred in giving and refusing instructions. We have examined the instructions given and refused, and have considered the points which counsel for appellee has made upon the action of the court below in that regard, and the authorities cited by counsel in support of his contention, and we are of opinion that no substantial error was committed by the court.

We must be content with stating this conclusion, as we have not the time to enter upon a discussion of the position taken by the counsel, and of the facts of this case, which, in our opinion, distinguishes it from cases in which instructions refused by the court in this case, were approved and sustained.

We find no error, and the judgment of the Superior Court must therefore be affirmed.

Judgment affirmed.

CHICAGO CITY RAILWAY COMPANY

V.

MARY A. ROBINSON, ADM'X.

Personal Injuries—Street Railway—Death of Child—Action for Damages—Questions for Jury—Negligence—When not Imputed to Parent.

1. In an action against a street railway company to recover damages for causing the death of a child, it is *held*: That the court properly overruled a motion to instruct the jury to find for the defendant; and that the questions whether the deceased was in the exercise of reasonable care and whether the defendant was guilty of negligence, were for the jury.

2 It is ordinarily a question for the jury whether, under the circumstances of the particular case, a failure to stop until the view is clear and look for an approaching train is such negligence as should defeat a recovery.

3. Where the child injured is in the exercise of ordinary care the question whether the parent was negligent does not arise.

4. Where the evidence is sharply conflicting this court will not interfere with the verdict of the jury.

[Opinion filed May 31, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. HYNES & DUNNE, for appellant.

Messrs. FRANK J. SMITH & HELMER and MELVILLE W. FULLER, for appellee.

Per Curiam. The action in this case was brought to recover damages for killing the child of appellee through the alleged negligence of the servants of appellant.

Appellant was operating a double track street car line on State Street in Chicago, and the trains, each of which consisted of a "grip" and one or two passenger cars, were driven by a cable running beneath the surface of the road at a speed of seven miles an hour. There was a gate across the platform of each car on the side toward the track on which the trains traveled

in opposite directions, which prevented passengers from getting on or off the cars on that side of the train.

Plaintiff's evidence tended to show that on the morning of the accident, the plaintiff, with her boy, five and one-half years of age, and some relatives with their children, got on a north bound train, on State Street, on their way to attend a funeral, and rode to Twenty-fourth Street, intending to proceed west on the north side of said street. The train stopped on the north foot crossing of Twenty-fourth Street and the party alighted from the east side of the rear platform. A boy about nine years old, who was of the party, was the first to get off, and next to him the deceased, closely followed by his mother. The older boy ran westward across the west track of appellant and the deceased ran after him, and was struck by the "grip" of a south bound train and killed.

The running of the cable over the pulleys in the street and through the "grip" of the standing car made considerable noise, and the approach of trains is almost noiseless, and the south bound train was not heard by plaintiff's witnesses, and their evidence tended to show that there was no bell or gong sounded, and no signal or warning of the approach of the train given, and that the movement of the train was very rapid. The standing train obstructed the view of the west track so that persons alighting from said train on the east side would not see the south bound train until it passed the rear of said standing cars.

On the close of the plaintiff's evidence, counsel for the defendant company moved the court to instruct the jury to find for the defendant on the ground of the absence of proof of due care on the part of plaintiff, and the absence of proof of negligence on the part of defendant. The court overruled the motion, and this is the principal ground of error urged upon us for a reversal of the case.

We are of opinion that the court properly overruled said motion. The questions whether deceased was in the exercise of reasonable care, and whether the defendant company was guilty of negligence, were properly questions for the jury to determine. Appellant's counsel invokes the doctrine that

it is negligence *per se* to cross a railroad track without stopping and looking to see that there is no approaching train, and argues that as there is no proof that defendant's train was running at an unlawful rate of speed, they could not be held guilty of any negligence.

The doctrine invoked is not to be applied as a hard and fast rule in every case of an injury, even at crossings of steam railroads. Ordinary care and prudence under all the circumstances in the particular case is all that the law requires, and it is ordinarily for the jury to decide whether, under the circumstances, a failure to stop until the view is clear and look for an approaching train, is such negligence as should defeat a recovery.

We are not willing to state, as a matter of law under all the circumstances of this case, that deceased was, at the time of the injury, guilty of a want of ordinary care, nor can we say that the evidence did not warrant the submission of the question of defendant's negligence to the jury. To rush a train going in one direction over a street crossing at a rapid speed, and without signal or warning, while a train bound in the opposite direction is discharging passengers at the crossing, and where persons young and old are liable to be crossing the street, is such an act as, in our opinion, fully warrants the conclusion of negligence.

In passing on this branch of the case we of course consider only plaintiff's evidence, and the inferences that can be reasonably drawn from it. There is a sharp conflict on several points when defendant's evidence is looked at, but the conflict has been settled by the verdict in favor of the plaintiff.

There is one objection urged against an instruction given, and that is, that plaintiff's instruction excluded the question of the mother's negligence, if any, from the consideration of the jury. The plaintiff's theory was, that the child was in the exercise of ordinary care, and hence that no negligence could be imputed to the parent. This is the rule of law. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y. 317; *Cummings v. Brooklyn City R. R. Co.*, 6 Cent. Rep. 394.

The court instructed the jury very fully as to the question

Alexander v. N. W. Masonic Aid Ass'n.

of the mother's negligence, at the request of the defendant, and considering the instructions as a series, the whole law arising upon all theories of the case was given to the jury.

We are of opinion that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

WILLARD H. ALEXANDER ET AL.
v.
THE NORTH WESTERN MASONIC AID ASSOCIATION
ET AL.

Administration—Personal Property—Rights of Widow—Mutual Benefit Certificates.

Upon the death of a husband leaving no child or children or descendants of a child or children, the widow is entitled to the entire proceeds of mutual benefit certificates payable "to the heirs at law" of the deceased.

[Opinion filed May 31, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

MESSRS. CRATTY BROTHERS & ASHCRAFT, for plaintiffs in error.

MR. E. WALKER, for defendant in error.

Per Curiam. The questions in this case arise upon a bill of interpleader brought by the North Western Masonic Aid Association and the personal representatives of the estate of Elijah S. Alexander, deceased, against the appellants, heirs of said deceased, for the purpose of a judicial determination of the question of the disposition of a fund of \$8,500, in the hands of said association, and accruing by reason of the membership

therein of said deceased in his lifetime, and three certain certificates of the association issued respectively January 28, 1882, whereby the said association promised and agreed to pay to the devisees or to the heirs at law of said Elijah S. Alexander, etc., the sums specified in each, aggregating said sum of \$8,500. The said Alexander died intestate, February 23, 1886, leaving no child or descendants of a child, but leaving Josephine P. Alexander, his widow, him surviving.

The court below by its decree determined that said widow was the sole heir at law to the personal property of said deceased and that the other heirs at law, the father, mother and brother, etc., had no right, title or interest in said fund or any part thereof.

From that decree this appeal was taken. Upon due consideration we are of opinion that the case is governed by the rules announced in *Richards v. Miller*, 62 Ill. 417, and that the decree below should be affirmed.

Decree affirmed.

ALFRED H. ANDREWS, IMPLEADED, ETC.,

v.

MARY BOEDECKER, ADMINISTRATRIX, ETC.

Master and Servant—Volunteer—Motive—Liability of Master—Personal Injury—Instructions.

1. The master is liable for a personal injury caused by the negligence of a third person in piling lumber handed him by a servant of the master for that purpose, although the service performed by such third person was voluntary and without compensation.

2. In the case presented, it is *held*: That the relation of master and servant, as respects the rights of third persons, was established when such volunteer was allowed to assist in the defendant's work; and that the motive which induced him to perform gratuitous service is unimportant.

[Opinion filed May 31, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GABY, Judge, presiding.

Messrs. LYMAN M. PAINE and ALLAN C. STORY, for appellant.

The court, in the first instruction given for the appellee, told the jury that if the teamsters of Andrews piled the lumber in question, with the voluntary and gratuitous assistance of Honey, then Andrews would be liable for any negligence in the piling. But under the law as laid down in the text books and in the cases cited, the conclusion does not follow the premises. As a matter of fact, Honey alone did the piling, so far as the fall of the pile was caused by negligence in the piling. The evidence does not show that appellant had the slightest control over the manner in which the piling was done. It is certain beyond controversy that appellant had no control over the pile after it was built. The yard had gates with locks, and appellant had no key. It was not the business of appellant to pile the lumber when delivered to the kiln.

The duty of the teamsters was simply to deliver the lumber in the yard. When delivered, either upon the platform or elsewhere, it passed immediately into the control of Douglas and Honey. The instruction assumes to give all the facts necessary for a verdict of guilty. The Supreme Court has said that such an instruction must state fully all that need be proved, so that if there were no other evidence, there could be no question as to the rights of the parties. *St. L. & S. E. Ry. Co. v. Britz*, 72 Ill. 256; *C., B. & Q. R. R. Co. v. Griffin*, 68 Ill. 507.

The instruction is erroneous in not informing the jury that, in addition to the facts named, they must also find that, in piling the lumber, the teamsters and Honey must be engaged in the business of appellant, and that the person guilty of negligence must be under the control of appellant while performing the negligent act, before they could find the appellant guilty.

Was Honey acting as a servant of Andrews in piling the lumber? Was he not, rather, on the pile all the way up, "directing and placing the lumber until the pile was completed"? Did he represent the will of appellant, "not merely in the

ultimate result of his work but in all its details"? Shearman & Redfield on Negligence, Sec. 73.

If Honey had any interest in having the lumber piled as he himself piled it, then he was not a mere volunteer. The instruction should have been qualified by the court so as to draw a distinction between Honey's voluntary assistance with the intention of doing Andrews a service and his voluntary assistance with the intention of rendering his contract with Andrews more easily performed by himself. *Holmes v. N. E. Ry. Co.*, 6 L. R. 123; *Wright v. London & N. W. Ry. Co.*, 1 L. R. Q. B. Div. 252.

In no respect does Honey fit the description of servant; neither in putting up the pile nor in taking it down. This court found from the evidence on the former trial that all the work done by Honey for Andrews was done, not as a servant, but as an independent contractor, and the evidence in this record is in all material respects the same. If the teamsters could be considered at all as assisting in the construction of the pile in question, it is clear that in so doing they were assisting Honey, and in such case, if negligent, their negligence could not be imputed to Andrews. *Shearman & Redfield on Negligence*, Sec. 73.

GEORGE W. STANFORD, for appellee.

It is not denied that the primary duty to safely pile this lumber was upon the teamsters of appellant. This is too firmly established by the evidence to admit of doubt. Their duty was to safely pile the lumber; and if, while acting for the appellant, they permit some one else to interfere and assist them in the work, and injury comes by reason of negligence of the one whom they permit to interfere, the negligence is theirs, and their principal would be liable. *Althorf v. Wolfe*, 22 N. Y. 355; *Wood's Master and Servant*, Sec. 308, p. 588; *Randleson v. Murray*, 8 Ad. & Ell. 109. The men who piled this lumber which fell, were at all times under the absolute control of appellant and his foreman. It will not be contended by the appellant that he could not, either by his foreman or in person, if he had desired, have absolutely controlled and shaped

his work. Manifestly if the foreman had ordered the lumber to be cross-piled or braced it would have been so piled. The control of this work was wholly with appellant, and if his teamsters, acting alone, or acting with Honey as a mere volunteer assistant, have been guilty of negligence, the principal ought to be held to respond for damages resulting from such neglect.

The whole logic of the first instruction is that the liability of appellant could not be lessened by the fact that his teamsters had permitted a volunteer to aid them, and I do not think that any of the authorities cited by counsel militate against this instruction in that particular.

The acts of Honey while assisting the teamsters in piling this lumber were the acts of the teamsters. They controlled him, or had the right to do so, and if Honey was acting in a negligent manner it was their duty to control him. *Althorf v. Wolfe*, 22 N. Y. 355, as also *Booth v. Mister*, 7 Car. & P. 76.

BAILEY, J. This was an action on the case brought by the administratrix of Henry J. Boedecker, to recover damages for the death of her intestate. The suit was originally brought against Alfred H. Andrews and Frank Douglas, and, at a former trial, the jury found defendant Andrews guilty and assessed the plaintiff's damages against him at \$5,000, but found defendant Douglas not guilty. Judgment having been rendered on said verdict, Andrews appealed to this court, and on such appeal said judgment was reversed on account of an erroneous instruction to the jury, and also for the reason that the damages awarded by the jury were excessive. *Andrews v. Boedecker*, 17 Ill. App. 213. A second trial has now been had, resulting in a verdict and judgment against Andrews for \$2,500, and he has again appealed to this court.

The material facts in the case are set forth at length in *Andrews v. Boedecker*, *supra*, and need not be repeated here. The principal controversy at the second trial was upon the question whether the lumber which fell and caused the death of the plaintiff's intestate was piled up by a person or persons between whom and the defendant there existed the legal rela-

tion of master and servant, so as to call for an application of the maxim *respondeat superior*.

The evidence tended to show, and, we think, warranted the jury in finding, that a teamster in the service of the defendant unloaded the lumber constituting the lower portion of said pile from the defendant's wagon, and piled the same without assistance, the pile thus formed being about five feet high. Subsequently said teamster brought the residue of said lumber to the yard where it was to be unloaded, and took it from the wagon and placed it on said pile with the assistance of Andrew R. Honey, thus making the pile about twelve feet high. In unloading and piling said lumber said teamsters stood on the ground, and after raising each piece of lumber so as to balance it on the stake of the wagon, raised the opposite end up so that Honey, who was standing on the pile of lumber, could get hold of it. Honey then took it and placed it on the top of the pile.

The service thus performed by Honey was voluntary and without compensation. He had a contract with the defendant by which he was to be paid 20 cents per thousand feet for taking the lumber from the piles and placing it on the platform of the dry-kiln, but aiding in unloading the lumber from the defendant's wagons and piling it in the yard does not seem to have been within the terms of his contract. There is also some evidence tending to show that piling the lumber in the yard to a considerable height, rendered it easier for him afterward to transfer it to the platform.

That the relation of master and servant existed between the defendant and his teamster is not questioned. Did it also exist between the defendant and Honey? He was a volunteer, it is true, and was giving his services to the defendant gratuitously, but we are unable to see how that circumstance should change the liability of the defendant as to third persons. The services which Honey performed were in all respects subject to the defendant's direction and control and it was wholly immaterial whether Honey was paid for them or not.

On this question the case of *Althorf v. Wolfe*, 22 N. Y. 355, is directly in point. There it was held that a master who di-

Andrews v. Boedecker.

rected his servant to remove snow and ice from the roof of his house was responsible for an injury thereby occasioned to a passer-by, whether the negligence was that of the servant or of a third person who volunteered to assist him. *Booth v. Mister*, 7 Carr. & P. 76, was an action on the case for damage done to the plaintiff's cabriolet from the negligence with which the defendant's cart was driven, and it was held that the defendant would be liable, although it should appear that the defendant's servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding with him, and who was not in the service of the defendant.

The instructions of the court to the jury were in harmony with the principles above stated, and, applying those principles, the evidence was clearly sufficient to charge the defendant with liability for the negligence of Honey.

But it is urged that the motive which induced Honey to render defendant these voluntary and gratuitous services was, that by piling up the lumber in the yard in the way he did, he rendered its subsequent removal to the platform of the dry-kiln more easy, and it is urged that for that reason a different rule should apply. The evidence being clear that the unloading of the lumber from the wagons and piling it in the yard was no part of Honey's contract, we are unable to see how the motive by which he was induced to perform gratuitous services for the defendant can be of any consequence. The work which he did was the defendant's and not his, and so far as he was allowed by the defendant to take part in its performance, he must be held to have established between himself and the defendant, so far at least as third persons are concerned, the relation of master and servant.

We have carefully considered the other questions raised by the defendant's counsel in their briefs, and are of the opinion that none of them are well taken. As we find no error in the record, the judgment will be affirmed.

Judgment affirmed.

WILEY S. SCRIBNER ET AL.

v.

SAMUEL B. CHASE ET AL.

Recorders—Control of Original Instruments and Books—Right to Make Abstracts—County Commissioners—Resolution—Injunctions.

1. Prior to the acts of May 31 and June 16, 1887, persons engaged in the business of making abstracts of title to real estate were not entitled to have access to original instruments and to books of records in the recorder's office, to make abstracts thereof for purposes of their business.

2. This court is of the opinion that a resolution of the board of commissioners of Cook County, directing the recorder to deny the use of his office to all abstract firms, companies and corporations, for the purpose of making abstracts, was unauthorized and void.

[Opinion filed June 13, 1888.]

APPEAL from the Superior Court of Cook County, the Hon. HENRY M. SHEPARD, Judge, presiding.

This was a bill in chancery brought February 25, 1886, by appellees, composing the firm of Handy & Company, who were engaged in the business of keeping an abstract office and furnishing to customers and patrons, for hire or reward, abstracts of title to real estate situate in the county of Cook, against the appellant Scribner and the other appellants comprising the individual members of the board of county commissioners in and for said county, for an injunction. The bill, after setting out in detail the nature of complainants' business, alleged that on February 17, 1886, said recorder caused them to be served with the following copy of a notice:

"COOK COUNTY RECORDER'S OFFICE. }
"February 17th, 1886. }

"MESSRS. HANDY & Co.

"*Gentlemen:* The board of commissioners of Cook County, at its regular session, held on Monday, February 15, 1886, having adopted the following resolution, to wit:

Scribner v. Chase.

“Resolved, that the recorder of deeds be and is hereby directed to deny to all abstract firms, companies and corporations, the privilege of using the recorder's office for the purpose of advancing their private business.

“Now, therefore, in compliance with said resolution, and as I am by law entitled and empowered to do, I hereby give you notice that it will be necessary for you on or before Saturday, February 27, 1886, to withdraw from this office the force of men here employed by you in making copies or abstracts from the original instruments and records of this office, and that from and after that date I shall be compelled to deny access to the original instruments and records of this office to all parties desiring to make copies or abstracts of the same for speculative purposes or for their own private gain.

“Very respectfully yours,

“WILEY S. SCRIBNER,

“Recorder of Deeds.”

The bill set out a claim of absolute legal right on the part of complainants to have their clerks, employes and agents, to occupy at all such times as should be convenient to them, such portions of the recorder's office as was necessary for the purpose, and to use and handle all original instruments left in said office for record as well as all books of records pertaining to real estate in said county, without hindrance or interference on the part of said recorder, in order that complainants might continue their tract indices and abstract books kept in their office for the purposes of their business as aforesaid. It alleged an intention on the part of the defendants to deprive complainants of that right, and irreparable damages which they would suffer in consequence, and prayed for an injunction against the defendants to restrain them from denying access to such original instruments or record books or interfering with such clerks, etc., in making use of, handling or abstracting the contents of such originals or records, and that such injunction be made perpetual. Upon hearing on pleadings and proofs the following decree was entered, from which defendants appealed:

“This cause having come on to be heard upon the amended

bill of complaint, the answer of the defendants thereto, and the replication of the complainants to such answer, and the proof, oral and documentary, taken in open court in said cause, and having been argued by counsel for the respective parties, the court upon due consideration thereof doth find that the material allegations of said amended bill of complaint are true and that the equities of this cause are with the complainants, and thereupon it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree that the said defendant Wiley S. Scribner, recorder of deeds of Cook County, and his successors in office, and his and their deputies, clerks, employes, agents and servants, and the said defendants, Christian Casselman, Peter Fortune, Christian Geils, John Hannigan, Henry Heimmelmarn, M. R. Leyden, C. F. Lynn, F. A. MacDonald, R. S. McClaghrey, James J. McCarthy, Frank Neisen, R. M. Oliver, John E. Van Pelt, Daniel J. Wren, George Klehm, board of county commissioners of Cook County, and their successors in office, and their deputies, clerks, employes, agents and servants, be, and they, and each and every one of them, are hereby perpetually enjoined and restrained from excluding from the office of the recorder of deeds of Cook County, the said complainants, or any of them, or their clerks, or employes, and from denying to the said complainants, or any of them, or their clerks or employes, access to the original instruments filed in said office, and the records and record books in said office, and from interfering with the said complainants, their clerks or employes, or any of them, in making use of, handling and abstracting the contents of said original instruments and records in the same manner as they have heretofore used, handled and abstracted such original instruments and records, and from interfering with or in any manner hindering the said complainants, or any of them, or their clerks or employes, from examining all the original instruments filed for record in said office, and from taking such memoranda thereof as may be necessary to make up original entry sheets, and to verify the same as they have heretofore done. But this decree shall not be construed to prevent the recorder of deeds from changing the method or

manner of conducting the business of his office, when required by the public interests, such changes to apply to all persons alike without discrimination. It is further ordered, adjudged and decreed that the complainants recover of the defendants their costs to be taxed by the clerk."

Mr. J. L. HIGH, for Wiley S. Scribner, appellant.

At common law no person was entitled to an inspection of records of a public or *quasi* public nature, unless some personal or property right of the person seeking such inspection was involved. King v. Lucas, 10 East, 235; King v. Tower, 4 Maule & S. 162; King v. Justices of Staffordshire, 6 Ad. & El. 68; King v. Allgood, 7 T. R. 746; Rex v. Merchant Tailors Co., 2 Barn. & Ad. 115; Crew v. Saunders, 2 Strange, 1005; Ex parte Hutt, 7 Dowling's Pr. Rep. 690; Hereford v. Bridgewater, Bunb. 269; Attorney-General v. Coventry, Bunb. 290; Ex parte Briggs, 1 Ell. & Ell. (E. C. L.) 881; King v. Clear, 4 Barn. & Cress. (E. C. L. R. 10), 899.

The courts will not by mandamus or injunction compel a recorder of deeds, or clerk of a court of record, to submit his records to be examined or abstracted by persons engaged in the business of furnishing abstracts of title for private gain, such persons having no interest in the property in question. Webber v. Townley, 43 Mich. 534; Bean v. People, 7 Colo. 200; Buck v. Collins, 51 Geo. 391; United States v. Anderson, United States Circuit Court, District of Indiana, unreported.

To the same effect see also In re McLean, 9 Cent. Law Jour. 425; Brewer v. Watson, 71 Ala. 299.

Mr. WILLIAM LAW, JR., for board of county commissioners, appellant.

Mr. MELVILLE W. FULLER, for appellees.

Nothing is better settled than that a municipal corporation can not enact ordinances that are unreasonable and oppressive, or such as will create a monopoly. Tugman v. Chicago, 78 Ill. 405; Chicago v. Rumpff, 45 Ill. 90; Bloomington v. Wahl, 46 Ill. 489.

An unreasonable ordinance is void. 8th Coke, 126; Dunham v. Rochester, 5 Cow. 465; Commissioners v. Gas Company, 12 Pa. St. 322. "A by-law must be reasonable though made in pursuance of an express power, or it will be void." Kennebec R. R. Co. v. Kendall, 31 Maine, 477. "If by-laws are unequal in their operation they will be void." Boston v. Shaw, 1 Metcalf, 130, 135; Mayor of Hudson v. Thorne, 7 Paige, 263; Mayor of Columbia v. Beasley, 1 Humphrey, 241; Mayor of Memphis v. Winfield, 8 Humphrey, 707, 709.

Inasmuch as the object of the resolution in question and its effect, if carried out, was and would be to create a monopoly in the abstract business, it was utterly void, and as the effort of the recorder to put it in operation would result in irremediable injury to the complainants, they were entitled to the preventive interposition of a court of equity.

Access to the records of deeds, mortgages, etc., is the absolute right of every citizen in relation to his own property, or property whose owners he represents.

And since deeds, mortgages and other instruments of writing, authorized to be recorded, take effect and are in force from and after the time of filing the same for record, and the evidence establishes that such documents can not, in fact, be spread upon the records until weeks after they are filed, access to the originals can not be denied.

The argument *ab inconvenienti* has no application, for a public official can not be allowed in this country to complain that it is inconvenient for him to allow the dissemination of the information his office was created to impart.

Judge Dillon in his work on Municipal Corporations says, Sec. 240: "Every corporator has a right to inspect all the records, books and other documents of the corporation upon all proper occasions; and if upon application for that purpose the officer who has the custody refuse to show them, the court will grant a mandamus to force his right. When the corporator's application to inspect is founded on his general right he has a mandamus, but when it is founded on a suit pending he obtains a rule." See *People v. Cornell*, 47 Barb. 329; *Herbert v. Ashburners*, 1 Wilson, 297.

In *Townsend v. Register of Deeds*, 7 How. Pr. 413, it was held that any person so desiring had a right to examine the books of record, without charge, and this would be accorded not as a privilege, nor as a favor, but as a matter of absolute right. In *State v. Williams*, 41 N. J. 332, the English cases are considered at length, and it is said: "It seems, therefore, to be sufficient if the person seeking inspection has such an interest in a specific controversy as will enable him to maintain or defend an action for which the public documents will furnish competent evidence or necessary information. Nor is it essential that his interest should be private, capable of sustaining a suit or defense on his own personal behalf. It will justify his demand for inspection, if he may act in such suit as a representative of a common or public right."

The evidence establishes, and it will not be denied, that all real estate transactions in the county of Cook, selling, borrowing, etc., have been for years conducted upon the basis of these abstracts of title, and that the entire business community reposes upon this system, which has obtained for so long a time that the present generation can not remember to the contrary.

The attempt by action under the resolution in question to put an end to complainants' business is destructive of the fruits of the uninterrupted labor of fourteen years, since the fire, and subversive of the public interests, not only furthered by but absolutely based upon the system, which has subsisted for thirty-four years.

That the continuation of the existing abstracts of title is of public concern is sufficiently apparent from the evidence, and is expressly recognized as such by the "Act to remedy the evils consequent upon the destruction of any public record, by fire or otherwise," (Hurd's Rev. Stat. 1881, 877,) by section 23 of which the business is largely regulated.

Threatened with special injury, the complainants can in their own names vindicate the public interests. *Chicago v. Un. Build'g Asso.*, 102 Ill. 379.

Messrs. GOUDY & GREEN, also for appellees.

McALLISTER, J. The transactions in question took place, and the bill in this case was brought, before the statutes concerning recorders and the inspection of records in the office of the former, approved respectively May 31 and June 16, 1887, were passed. (Sess. Laws, 1887, p. 256, 258.) Consequently, the provisions of those acts can have no application to this case, and it must be decided upon the law as it stood at the time of bringing the suit. The question therefore is, were the complainants entitled, as a matter of legal right, to have access to the original instruments left in the custody of the recorder for the purpose of having them recorded, and to books of records in the office, and to handle, use and make abstracts of them, for the purposes of their business, without interference or hindrance on the part of the recorder of deeds? There is nothing in the statute relative to recorders of deeds, as it then existed, which gives the least color to any such claim. By such statute, the oath for the faithful discharge of his duties, Sec. 22, requires him to give a bond with sufficient security in the penal sum of \$20,000, and prescribes the condition of that bond, which shall be "for the faithful discharge of his duties, and to deliver up all papers, books, records and other things appertaining to his office, whole, safe and undefaced, when lawfully required so to do." 2 Starr & C. Ill. Stat. p. 1984. That provision is a plain, indisputable, legislative recognition of the common law rules applicable to such officer and his duties, to the effect, that by virtue of his office he becomes the legal custodian of all papers, books and records appertaining to his office, and is responsible for their preservation from injury, alteration, mutilation, defacement or safekeeping.

Now, can it be maintained that the law is so unreasonable as to charge a public officer with such duties and responsibilities, but deny to him the power, control and discretion, as to the subject-matter, necessary to his protection? The question is not new in the courts of this country. It has arisen and been decided in various courts of the highest respectability, against the claim set up here, in cases that can not be distinguished from this case with regard to the reasons and principles governing their decision. *Webber v. Townly*, 43 Mich.

Village of Jefferson v. Chapman.

534; Bean v. People, 7 Col. 200; Buck v. Collins, 51 Ga. 391; Cormack v. Wolcott, Register, 37 Kan. 391.

The effect of the decree in this case is to divest the recorder of the power conferred upon him by the law, of exercising a reasonable discretion in the care, management and government of his office, and the preservation of original deeds, books and records, confided to his custody. The decree is, for that reason, unauthorized by law, and manifestly erroneous. The Title Guarantee Trust Co. v. Reilly, Register, 38 Hun, 429; The German-American Loan & Trust Co. v. Richards, Register, 99 N. Y. 620.

The resolution of the board of county commissioners, embodied in the notice given by the recorder to complainants, and set out in our statement of the case, was, in our opinion, unauthorized and void. And it seems to us that the only decree to which the complainants were entitled, would have been a decree declaring such resolution void and restraining defendants from attempting to carry it into effect.

The decree of the court below will be reversed and the cause remanded, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

VILLAGE OF JEFFERSON

V.

GEORGIA CHAPMAN.

Municipal Corporations—Personal Injuries—Defective Sidewalk—Agency—Notice—Evidence—Instructions—Practice.

27	43
59	545
27	43
70	95

1. A municipal corporation, incorporated under the general law, is liable to any party injured, while exercising ordinary care, by reason of a breach of its duty to keep its streets and sidewalks in a reasonably safe condition for traveling in the ordinary modes.

2. A municipal corporation can not escape liability for an injury caused by the use of defective material in restoring a cross-walk over a ditch, on the ground that the work was done by an independent contractor, if the re-

VOL. 27.]

Village of Jefferson v. Chapman.

removal of the walk was a necessary incident of the work which he was directed to perform.

3. Where it is sought to hold a municipal corporation liable as the direct author of the nuisance complained of, notice by lapse of time or otherwise is unnecessary.

4. It is proper to reject evidence which is inadmissible for the purpose for which it is offered, although admissible for other purposes. The party making the offer will be confined in this court to the offer made at the trial.

5. It is proper to refuse instructions touching an issue which is immaterial upon the theory of the case as tried.

[Opinion filed June 13, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

This was an action by the appellee against the village corporation, appellant, to recover for a personal injury to the former, while traveling on the sidewalk along St. Charles Avenue after dark December 2, 1885, occasioned by the sudden tipping of a loose plank of a defectively constructed crossing over a ditch at the intersection of said street with Center Street in said village.

The declaration contained three counts, of which the first, after setting out the legal duty of the corporation, charged the defendant with having negligently suffered the said cross-walk to be and remain in a bad and unsafe condition on account of the plank thereof being unfastened and insecure, and to so continue for such a period of time before said injury, as that defendant might, by the use of reasonable care and diligence, have discovered the defects and repaired the same, setting out the special circumstances of the injury.

The second count avers that defendant, having removed a cross-walk at the place in question for the purpose of repairing the street and improving the drainage, in restoring the same, negligently used decayed and broken planks, placed and left the same without nailing or fastenings, etc.

The third count charged, in substance, that defendant negligently caused said cross-walk to be constructed of decayed and broken planks and left the same across said ditch without being nailed or otherwise fastened, etc.

Village of Jefferson v. Chapman.

The evidence tended to show that a few days before the injury to plaintiff, persons employed by the defendant had been at work regulating the grade, cleaning out and deepening the ditch at the place in question; that the removal of the apron made of planks, and being the crossing over said ditch, which had been there and used as a crossing previously, was a necessary incident to the doing the said work; that it had been removed as a part of said work by said persons, and without such crossing the street was dangerous to travelers on foot; that just before the time of plaintiff's injury, said persons doing said work, attempted to replace the apron or crossing over said ditch; that some of the planks used were rotten at the end, were unfit for the purpose, were improperly laid and left without reasonably safe supports or fastenings; that on the evening of December 2, 1885, a little after dark, the plaintiff, while traveling along St. Charles Avenue, being wholly unapprised as to the situation of said apron or crossing, and in the exercise of due care, walked upon the said apron as a part of the street crossing, when a plank thereof, on which she had stepped, suddenly tipped out of its proper place, by reason of which her right foot and leg went down toward the bottom of the ditch while her body was thrown violently backward and down upon the planks, thus inflicting a severe, painful and probably permanent injury, involving the spinal and uterine regions of her body.

The defendant introduced evidence tending to show that the work in question was done under a verbal contract between it and one Goven, and asked of one of the trustees of the village, who had been called as a witness, "what was the contract?" Upon objection by the plaintiff's counsel, the counsel for defendant thereupon stated to the court: "We want to show that this work was done by contractors without any supervision of the village authorities; that this apron was placed in its position and in the condition in which it was at the time of this accident by the contractors, without any supervision, or without any influence, or without consent of the village authorities." The court excluded the offer, and defendant

excepted. Counsel for defendant thereupon made the following offer of evidence:

Mr. Cox: Now, we offer to prove by this witness, as one of the trustees of the town of Jefferson, and Henry Wolffe, as another trustee, that they were authorized by the board of trustees of the village of Jefferson to make a contract for the grading of St. Charles Avenue and Center Streets, at the point where the accident is alleged to have occurred; that, in accordance with this authority, they made a contract with one Goven for the grading of such streets; that said Goven, acting under said contract, proceeded with the work of grading said street, and that he, in the prosecution of that work, removed the apron over the ditch where the accident was alleged to have occurred; that the village retained by the contract no control or supervision over the work; that said contractor proceeded with said work until the close of the 2d day of December, 1885, and on the evening of said day, prior to the accident, replaced the apron in the condition in which it remained at the time of said accident.

This offer was likewise excluded by the court, and the defendants excepted. No other evidence upon the points was offered.

The defendant requested the court to give the following, among other instructions, but the court refused to give the same:

"The jury are instructed, that in order for the plaintiff to recover, she must show that the village had actual or constructive notice of the defect in the sidewalk; and that when a dangerous place is made in the sidewalk by third parties, unknown or without the knowledge or consent of the village authorities, the village can not be deemed negligent until knowledge or notice of such defect is brought home to the officers of the village, unless the dangerous place has existed for such a length of time before the injury, that the village authorities might or ought to have known of its existence by the use of reasonable diligence.

"If the jury believe, from the evidence, that the sidewalk in which the defect is alleged to have been, and where the

plaintiff is alleged to have been injured, was properly and safely constructed and laid down, and prior and up to or about the time of the alleged injury, it appeared to be in proper and safe condition, then, if there be no evidence that the defendant had actual knowledge of such defect, or that the defect existed for such a length of time before the injury that the defendant might or would have known it by the use of reasonable diligence, the jury should find the defendant not guilty.

“Notwithstanding the jury may believe from the evidence that the sidewalk at the time of the alleged injury was defective, yet this fact alone would not be sufficient evidence of negligence on the part of the defendant. In order to charge the defendant with negligence, it must appear from the evidence not only that the sidewalk was defective at the time of the alleged injury, but it must further appear that such defect was actually known to the village through some of its officers, agents or servants, or that the defect had existed for such a length of time prior to the alleged injury that the village, in the exercise of ordinary care, would or should have known of the defect.”

There was a verdict for plaintiff, and damages assessed at \$6,000, and the judgment thereon is brought here by appeal, the appellant assigning for error, among other things, the exclusion of said offers of evidence and refusal to give said instructions.

Messrs. JESSE COX and WILLIAM M. STANLEY, for appellant.

The question fairly arose for the jury as to whether the cross-walk was, at the time of the accident, in the condition it was claimed to be in by the appellee, and whether, if it was then in such condition, it had been in such a condition for such a length of time that the authorities of the village ought, in the exercise of reasonable diligence, to have discovered the defect and repaired the walk. *City of Chicago v. Murphy*, 84 Ill. 224; *City of Gilman v. Haley*, 7 Ill. App. 349; *City of Aurora v. Dale*, 90 Ill. 46; *City of Aurora v. Hillman*, 90 Ill. 61; *City of Chicago v. McCarthy*, 75 Ill. 602.

The evidence showed, or tended to show, that the defect in the walk was not caused by any act of the contractor, but that it existed, if it existed at all, prior to the removal of the walk by the contractor, and was due to the rotting of the planks, and the natural and ordinary wear and tear of the cross-walk. The fact, therefore, that this contractor removed and replaced the cross-walk in question prior to the accident, furnished no excuse for the court refusing to give the fourth, fifth and sixth instructions asked for by the appellant. The appellant was entitled to an instruction upon any theory of the case which it might adopt, if there was any evidence which might support such theory. *Bennett v. Connelly*, 103 Ill. 50; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Wooters v. King*, 54 Ill. 343.

Notice to the contractor or his men of the alleged defect in the cross-walk was not in any sense notice, either actual or constructive, to the village authorities. He was neither officer, agent, nor servant of the defendant corporation. *City of Chicago v. McCarthy*, 75 Ill. 602; *Hale v. Johnson*, 80 Ill. 185; *City of East St. Louis v. Giblin*, 3 Broad. 219.

While it may be admitted that a municipal corporation is bound to use due diligence to see that work authorized to be done under contract, is done in such a manner as not to expose others to injury, in a case where, from the character of the work to be done, danger necessarily ensues, yet it is well settled that where the work authorized is not necessarily dangerous, where the injury results not from the dangerous nature of the work itself, authorized by the corporation to be done, but from the negligent manner in which it is done by the contractor, the municipal corporation is not liable. *Pack v. The Mayor*, 8 N. Y. (4 Selden), 222; *Kelly v. The Mayor*, 11 N. Y. (1 Kernan), 432; 2 *Dillon on Mun. Corp.*, Secs. 1027 to 1033, and cases cited in notes.

And especially is this true where, as in this case, the obstruction or defect in the street (if any there was), causing the injury, is wholly collateral to the contract work, and is charged by the plaintiff to be entirely the result of the negligent and wrongful acts of the contractor, sub-contractor or his

Village of Jefferson v. Chapman.

servants. In such a case a municipal corporation is not liable. 2 Dillon on Mun. Corp., Sec. 1030; Robbins v. The City of Chicago, 4 Wallace, 657. The cases of the City of Springfield v. LeClaire, 49 Ill. 476, The City of Chicago v. Johnson, 53 Ill. 91, Storrs v. The City of Utica, 17 N. Y. 104, do not at all conflict with the doctrine contended for.

The statute limits the amount of damages for loss of life to \$5,000, and certainly by analogy, in cases where life is not lost, where the capacity of labor remains, and where it does not certainly appear that the injuries will be permanent, a verdict of \$6,000 for an injury of the kind claimed in this case is certainly excessive. In this State, we insist that the courts have uniformly discountenanced verdicts of this amount in cases of this kind. Kepperly v. Ramsden, 83 Ill. 354; Ill. Gen. R. R. Co. v. Welsh, 52 Ill. 183; City of Chicago v. Langlass, 52 Ill. 256; Chicago, R. I. & P. R. R. Co. v. McAra, 52 Ill. 269; Chicago & N. W. R. R. Co. v. Jackson, 55 Ill. 492.

Messrs. MONK & ELLIOTT, for appellee.

A municipal corporation is liable, without notice, for a defect caused by its own negligent act.

It is only when the defect results from natural wear and decay, or some other cause, for which the corporate authorities are not responsible, that notice is essential to recovery for injuries occasioned thereby. A party is not entitled to notice of his own acts. Springfield v. Le Claire, 49 Ill. 476; City of Chicago v. Johnson, 53 Ill. 91; Alexander v. Mt. Sterling, 71 Ill. 366; City of Chicago v. Brophy, 79 Ill. 277; Burso v. Buffalo, 90 N. Y. 679; Russell v. Inhabitants of Columbia, 74 Mo. 480; Mayor v. O'Donnell, 53 Md. 110; Circleville v. Neubing, 41 Ohio State, 465.

Municipal corporations are under an affirmative duty to see that the streets are kept free from such dangerous places, and are bound to exercise a reasonable degree of care and oversight to that end. The fact that work is being done upon the streets is no excuse for surrendering the control and supervision of them to a contractor. When such work is let to a

contractor, it is the duty of the corporation to retain and exercise sufficient control and supervision to enable it to see that the work is carefully and properly done. *City of Springfield v. Le Claire*, 49 Ill. 476; *Leshner et al. v. Wabash Navigation Co.*, 14 Ill. 85; *Hinde v. Same*, 15 Ill. 72; *Chicago, St. Paul & Fond du Lac R. R. Co. v. McCarthy*, 20 Ill. 385; *Scammon v. The City of Chicago*, 25 Ill. 424; *City v. Brophy*, 79 Ill. 277; *City of Chicago v. Johnson*, 53 Ill. 91; *R., R. I. & St. L. R. R. Co. v. Heflin*, 65 Ill. 366; *Cairo & St. Louis R. R. Co. v. Wolsey*, 85 Ill. 370; *West v. St. L., V. & T. H. R. R. Co.*, 63 Ill. 545; *Mayor, etc., v. Brown*, 9 Heiskell, 1; *Mayor v. O'Donnell*, 53 Md. 110; *Circleville v. Neubing*, 41 Ohio St. 465; *City of Detroit v. Corey*, 9 Mich. 165; *Russell v. Inhabitants of the Town of Columbus*, 74 Mo. 480; *Mayor v. Donnelly*, 71 Ga. 258; *McWilliams v. Detroit City Mills Co.*, 31 Mich. 274; *Stores v. City*, 17 N. Y. 109; *Robbins v. City of Chicago*, 4 Wall. 657.

It is submitted that the authorities cited are decisive of this case. Nor do these decisions rest upon mere arbitrary dictum. They depend upon and enunciate a principle founded in justice and reason. The village was made a body politic upon the condition that the trust confided to it be duly executed. Valuable franchises and powers were conferred upon a known and responsible body, and it would be intolerable if, while retaining the franchise, the obligations imposed for the benefit of the public could be shuffled off upon transient and irresponsible contractors. Georgia Chapman had no voice in the selection of the contractors who should do this work, nor in determining what precautions should be observed to have it done in a careful and prudent manner. She had nothing to say as to what provision should be made for the indemnity of the village against lawful claims arising from their negligence. All of these matters were in the hands of the village authorities, and if they surrendered the control of the street into the hands of irresponsible parties, without taking any security for the indemnity of the village, it was their own fault, and they should be answerable for it.

McALLISTER, J. The village of Jefferson, the appellant,

is a municipal corporation, created under the general statute relative to cities and villages in this State, by which the corporation is invested with ample powers in trust for the purpose, and from which the legal duty to the public arises, of keeping its streets and sidewalks in a reasonably safe condition for travel in the ordinary modes, by day as well as by night, by all persons in the exercise of ordinary care. 2 Dillon on Mun. Corp., 3d Ed., Sec. 1019. And it is the general, well settled law in this State, that such corporation is liable to any party injured while exercising such care, by reason of a breach of that duty. *Browning v. City of Springfield*, 17 Ill. 143; *City of Bloomington v. Bay*, 42 Ill. 503; *City of Rockford v. Hildebrand*, 61 Ill. 161.

We are of opinion that the verdict in this case was fully justified by the evidence. Counsel for appellant contend, that if the work upon the street and ditch in question was done by an independent contractor over whom, in doing such work, the village authorities had no control, and the work contracted to be done was not itself dangerous, then the village would not be liable and the remedy must be held that the trial court erred in rejecting the respective offers of evidence on defendant's behalf to that effect.

The difficulty with the counsel's position is, that one essential element is wanting in each of the offers made. Neither of them can fairly be construed as embracing any proposition to prove anything beyond the mere facts of there being a contract between defendant and Goven for doing the work in question; that it was done by the latter under such contract; and that, by the terms of the contract, the defendant had no control over the contractor as to its performance. On neither offer was there any intimation of a purpose or desire to prove that the work contracted for was not of itself dangerous, or would not necessarily render the street defective or unsafe or dangerous for travel, or that the removal of the apron, which formed a part of the cross-walk over the ditch was not a necessary incident to the doing the work contracted for.

The evidence tended to show that the removal of said apron was a necessary incident, and that it would render the cross-

ing defective and dangerous, especially in the night time, on account of the width and depth of the ditch.

If the removal of the apron was a necessary incident of the work directed to be done, and it would necessarily render the street defective and dangerous for the purposes of travel, unless such apron was restored in a reasonably safe condition, or the place provided with guards or protection, then the defendant was subject to the statutory obligation or duty to the public to make such restoration or provide such guards or protection; and failing therein, the defense that the work was done by an independent contractor is wholly inadmissible. The defendant, under such circumstances, must, in the eye of the law, be regarded as the direct author of the nuisance which resulted in the injury to the plaintiff. 2 Dillon, *supra*, Secs. 1029, 1030 and 1031; City of Springfield v. Le Claire, 49 Ill. 476; Joliet v. Harwood, 86 Ill. 110; Lockwood v. Mayor, 2 Hilt. 66; Storrs v. Utica, 17 N. Y. 104; Savannah v. Waldner, 49 Ga. 316; Murphy v. Lowell, 124 Mass. 564.

If we are correct in the above views of the law, then it must follow that there was no error in rejecting said offers of evidence, because, taking them as they were respectively made, the evidence proposed was immaterial, and it was not admissible for the purpose for which it was offered. If it was admissible for any other purpose, or by having some other matter coupled with it, then it was the duty of the counsel making the offer to specify such other purpose or matter, and failing to do so, the exception must fail. The party making the offer must be confined in the Appellate Court to the specific offer which he made at the trial. Wheeler v. Rice, 8 Cush. 208, and cases there cited; Beard v. Dedolph, 29 Wis. 136; Jones v. The State, 11 Lea (Tenn.) 468.

The only other point we deem worthy of mention, is the refusal to give the several instructions asked for defendant and set out in our statement of the case. The pith of them all is as to the requirement of notice to the defendant corporation of the obstruction or defect in the street, as an element of the cause of action.

It is true that the first count in the declaration sets out a

McGillis v. Bishop.

cause of action wherein such requirement is a necessary element. But the second and third counts respectively charge the defendant as the direct author of the nuisance in the street and as for acts of positive misfeasance. In such a case, notice to the corporation by lapse of time or otherwise, is unnecessary. *City of Chicago v. Johnson*, 53 Ill. 91.

The case was tried on behalf of plaintiff wholly upon the theory of the defendant being the direct author of the nuisance, and the evidence supported that theory. In each of the instructions in question, that feature of the case is wholly ignored; for that reason they were properly refused. To have given them would simply be the giving instructions calculated to mislead the jury.

We think the merits of the case were clearly with the plaintiff; that the verdict is well supported by the evidence; and that, taking the instructions all together, the jury was fairly and properly instructed as to every material point of law. The judgment should be affirmed.

Judgment affirmed.

JOHN J. MCGILLIS AND HENRY W. KING, IMPLEADED,
ETC.,

V.

F. W. BISHOP.

Trespass de Bonis Asportatis—Sheriff—Attachment Writ as Justification—Jurisdiction—Pleading—New Assignment—Trespass ab Initio—Joint Verdict—Damages.

1. Where the declaration states a case of trespass *de bonis asportatis*, the wrongful seizure of the goods and chattels described is the gist of the action, the conversion of the goods alleged being mere matter of aggravation.

2. Where the justification of a trespass is under a writ, warrant or other process of a court of record, and it is claimed that the defendant has been guilty of any illegal conduct or undue violence, the plaintiff should reply the facts or new assign. Matter showing that the defendant by subsequent misconduct became a trespasser *ab initio* should be specially replied.

27	53
91	672

3. Where a joint verdict against two defendants must be set aside as to one of them, it can not stand as to the other.

4. In an action of trespass against a sheriff and another to recover damages for an alleged wrongful levy on a stock of goods, it is *held*: That the sheriff may justify under an attachment writ regular on its face, although the subsequent proceedings were without jurisdiction because of an insufficient service or a defective return by the sheriff; that the attachment writ and evidence tending to show that the plaintiff was a fraudulent purchaser, were improperly excluded; that the pleadings furnished no foundation for the contention that the sheriff, by turning the plaintiff out and selling the goods under a void execution, became a trespasser *ab initio*; and that evidence touching the value of the good will of the plaintiff's business was improperly admitted and an instruction thereon improperly given.

[Opinion filed June 14, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

This action was brought to recover against appellants for levying on a certain stock of goods which was in the possession of appellee at Peshtigo, in Wisconsin. The levy was made and the goods seized by McGillis as sheriff of Marinette County, under attachment writs from the Circuit Court of said county against Ferdinand Armstrong, one of the writs being in favor of King and his partners. The declaration contained two counts. The first alleged that plaintiff was possessed in his own right, at Peshtigo, in the State of Wisconsin, of a certain stock of general merchandise, together with store fixtures and business equipments, and was carrying on a general merchandising business, which property was of great value; that the said defendants, wrongfully and without just cause or excuse, entered upon the premises, then and there being occupied by the plaintiff as aforesaid, and seized, took and carried away all of the said stock of merchandise, store fixtures, etc., then and there being, and which were then and there the property of the plaintiff, and converted the same to their own use, to the great wrong and injury, etc.

Second count: Plaintiff was at the day and year aforesaid, and at the place aforesaid, carrying on a business of great value, from conducting of which plaintiff was securing great

McGillis v. Bishop.

profits, and was well entitled to carry on said business without hindrance; nevertheless defendants wrongfully and unjustly and without proper cause or excuse therefor, entered upon the premises then being occupied by plaintiff, and then and there seized and carried away all the goods, wares, fixtures, etc., then in the possession of, and owned by plaintiff, which were then and there of great value, and converted the same to their own use, and thereby broke up and destroyed said business of the plaintiff, by means whereof plaintiff sustained great loss and damage, etc.

Appellant King pleaded not guilty; second plea, that property was the property of the plaintiff; and third, property in Ferdinand Armstrong.

McGillis pleaded not guilty, and a special plea setting out the issuing from the Circuit Court of Marinette County, Wisconsin, on October 23, 1884, in an action commenced therein by King et al. against one Fred Armstrong, of a writ of attachment directed to the sheriff of said county, commanding said sheriff to attach and safely keep all the property of said Armstrong within his county, or so much thereof as should be sufficient, etc., as security for the satisfaction of such judgment as said King and others might recover in said action, which said writ of attachment was, on said October 23, 1884, delivered to said defendant, who then and there was sheriff of said county, to execute according to law. By virtue of which said writ of attachment and for the purpose of executing the same, said defendant on the day aforesaid peacefully entered the said premises, doing no unnecessary damage, and seized the said goods and chattels in the said declaration mentioned and removed the same in execution of said writs, which are the supposed trespasses above complained of. And said defendant further says that the said goods and chattels in the said declaration mentioned at the said time when, etc., were the property of the said Fred Armstrong, and not of the said plaintiff, and were subject to attachment, and said defendant says that the said writ of attachment was by him duly returned into said Circuit Court of Marinette County according to law, etc.

A second special plea, substantially the same as the foregoing, was also filed by McGillis. To these special pleas plaintiff filed a replication *de injuria* and a traverse of the allegation in the pleas that the goods were the property of Armstrong, and not of the plaintiff. Upon the issue thus formed the case was submitted to a jury, and a verdict rendered in favor of appellee for \$7,500, on which verdict judgment was entered, and this case is brought to this court by appeal.

Messrs. TENNEY, BASHFORD & TENNEY, for appellant.

Messrs. W. P. BLACK and FAIRCHILD & FAIRCHILD, for appellees.

MORAN, P. J. The declaration states a case of trespass *de bonis asportatis*. The wrongful and unlawful seizure of the goods and chattels described is the gist of the action, just as in trespass *quare clausum* the breaking and entering the close is the gravamen of the charge. The conversion of the goods alleged in the declaration is but aggravation. Taylor v. Cole, 8 Tenn. 155; Gelston v. Hoyt, 3 Wheat. 326.

The defendant, McGillis, justified the seizure of the goods under a writ of attachment, and alleged that the goods were the property of the defendant in the attachment. Plaintiff put the whole plea in issue by his replication, and thus treated the plea as good in law, and as an answer to the whole declaration.

To establish his defense under this state of pleadings it was only necessary for McGillis to prove that he seized the goods under a valid writ of attachment, and that the goods were the property of the defendant in the writ, and liable to attachment at the suit of a creditor. The writ of attachment offered in evidence was valid and regular in form, and the return of the sheriff thereon was, in our opinion, in strict conformity with the requirements of the Wisconsin statute relating to proceedings in attachment. Sec. 2736, R. S. of Wis.; Hopkins v. Langton, 30 Wis. 379.

The court below excluded the writ from the consideration of the jury, and also excluded the evidence offered by defendants which tended to show that the goods and chattels levied on were the property of the defendant in the writ, and thus deprived defendant of all grounds of defense, and left no issue to be determined by the jury save the amount of the damages.

The ruling of the court in excluding the attachment writ and denying to the officer who executed it the justification which its command afforded to him, is sought to be supported on this appeal on two grounds. It is contended: First, that the Circuit Court of Marinette County, from which said attachment issued, never obtained jurisdiction of the defendant in the suit in which said writ was issued, and that the judgment entered in the case was therefore void; and that the writ and levy were also void, for the reason that there can be no valid writ and no valid levy where no jurisdiction over the defendant has been acquired by the court. Second, that if the writ is to be treated as valid and as affording a protection to the officer for the seizure made under its authority, yet, after the levy, the sheriff was guilty of such a gross abuse of his attachment process—because he expelled the plaintiff from the store where the goods were seized, and assumed entire possession and control over the same from October 25th till January 3d following, and then sold the goods under a void execution—that he became in law a trespasser *ab initio*, and forfeited any justification which the writ would otherwise furnish him.

As a basis for the first contention, it was shown by the introduction of the entire record of the suit in Marinette County, Wisconsin, that there was a defective return of service upon the summons issued against the defendant in said suit. The return which was made by the defendant, McGillis, as sheriff, stated that the summons was served on the defendant, F. Armstrong, the 28th day of October, 1884, "by then and there leaving a true copy thereof at his last and usual place of abode, in presence of Chas. Armstrong, his son, a member of his family of suitable age and discretion, to whom I explained the contents thereof."

The statute of Wisconsin authorizes service of summons,

in the manner stated in this return, only where the defendant is not found, and the return should show that the defendant was not found, and if such statement is omitted from the return, jurisdiction of the defendant is not shown. *Knox v. Miller*, 18 Wis. 397; *Northrup v. Shepard*, 23 Wis. 5-13.

The counsel in this case have devoted much discussion to the question whether the judgment entered on this service was void or voidable, and whether the return was amendable in the court where the judgment was rendered. The rule generally recognized is, that an officer will be permitted, in the discretion of the court, to amend his return according to the facts and in support of the judgment, and such we understand to be the practice in Wisconsin. *Rehmstedt v. Briscoe*, 55 Wis. 617.

It is contended by appellants that if the return might be amended in the Circuit Court of Marinette County, then the jurisdictional facts could be shown in the trial of this case by parol and an offer was made to show by McGillis, that at the time of the service and return of the summons, Armstrong could not be found in the county. We are not prepared to give assent to this contention, but do not find it necessary at this time to express any final judgment on the point.

If it be admitted that the court failed to obtain jurisdiction of the defendant, and that no valid judgment was entered in the suit, yet the sheriff would not be thereby deprived of the protection of the attachment writ. The attachment writ bears date October 23, 1884, and the sheriff's return on it shows that the goods were seized under it October 24th. The return on the summons shows that the service was made on the 28th of October. Grant that the service was invalid, or that the return, which was not made till November 10th, was not such as to show the jurisdiction of the court to proceed to judgment, how can the failure to obtain jurisdiction have a retrospective effect, and render the writ, which was a legal authority and mandate to the officer, at the time he seized the property in execution of it, impotent as a protection to him when he is sued in trespass for acts done in obedience to its command?

The law is not so. The writ was valid and regular in form and issued from a court having authority to issue it, and it became the duty of the sheriff when it was delivered to him, to levy it on the property of the defendant therein named promptly and unhesitatingly, and because he was obliged to obey its mandate the facts on its face must constitute his justification. "As a general rule an officer may justify under a writ regular on its face, whether the court had jurisdiction or not, although the writ be void." *Davis v. Wilson*, 65 Ill. 529.

This is not the question whether the officer will be deprived of the protection of his writ when he does acts which make him a trespasser *ab initio*. That question we will discuss under the second point. The question here is whether the officer must, in order to make out a justification under the writ of attachment, show that proceedings in the cause subsequent to the levy were regular and resulted in a valid judgment.

In an early case in Vermont it was held, where an officer had attached property, but made a return on the writ so defective that the suit was abatable, that the attachment was valid, and the officer could maintain trespass against subsequent attaching creditors who took the goods, and it was further held that even though the officer should be guilty of conduct which might render him a trespasser *ab initio*, yet his attachment, being originally lawful, would not be affected by his subsequent acts of omission or commission so as to make his levy void. *Newton v. Adams*, 4 Vt. 437.

In *Eaton v. Cooper*, 29 Vt. 444, it is said by Redfield, C. J., speaking for the court, that "the taking of property by virtue of a writ of attachment may be justified by the officer and creditor's attorney without showing regular subsequent proceedings in obtaining judgment, taking out execution," etc.

In *Grafton v. Carmichael*, 48 Wis. 660, the question now being considered was decided. There the defendant in a trespass suit directed and aided the officer in seizing property under an attachment writ. The writ was regular and valid in form, but the judgment was invalid by reason of a failure to

cause notice to the attachment defendant to be posted or published as required by law. It was insisted that the seizure could not be justified under the writ because the proceedings did not terminate in a valid judgment, but the court held otherwise, saying: "It will be borne in mind that the original taking was under lawful writs, and with this taking the agency of the defendant in the matter ends, unless on account of the defect in the subsequent proceeding, which was not owing to his fault, he is liable to be treated as a trespasser *ab initio*, and we do not think he can be held liable on that ground, there being no proof of any positive wrong on his part which would tend to show that the original taking, though lawful, was for some other indirect or unjustifiable purpose." It is argued that this case is to be distinguished in this point from the one just cited, for the reason that the failure to show jurisdiction and a valid judgment in this case is due to the act of the sheriff himself in failing to properly serve the defendant in the suit, or to make a sufficient return of service. But suppose he had utterly failed to make a return of the summons or had entirely failed to serve it. That would, at most, be a nonfeasance, and it is well settled, as stated by Spencer, C. J., in *Gates v. Lounsbury*, 20 Johns. 427, that, "when an act is lawfully done, it can not be made unlawful, unless by some positive act incompatible with the exercise of the legal right to do the first act."

We must conclude, therefore, that the attachment writ, offered, as it was, in connection with evidence showing that the plaintiffs in the writ were creditors of the attachment defendant, and with evidence tending to show that the purchase by plaintiff of said goods and chattels seized under the writ was fraudulent and void as to creditors, was proper and competent evidence under McGillis' pleas of justification, and that it was error for the court to exclude said writ, and the evidence tending to show that plaintiff was a fraudulent purchaser of said goods.

Second. But it is said, McGillis, by turning plaintiff out of the store in which the goods were, and by subsequently selling the goods under a void execution, became a trespasser *ab initio*,

and by his said wrongful acts lost the protection of his writ. The difficulty with this contention of counsel is, that assuming it for the present purpose to be sound, there is no foundation laid for it in the pleadings. As before stated, McGillis' pleas answered the trespass stated in the declaration, *i. e.*, the wrongful seizure of the goods. The conversion of the goods or their spoliation was mere aggravation. Plaintiff took issue on the plea by the replication, *de injuria*, but did not new assign.

It is a fundamental rule of pleading stated in all the text books on common law pleading and illustrated by numerous decisions, that, where the justification of a trespass is under a writ, warrant, or other process of a court of record, and it is claimed that the party has been guilty of any illegal conduct or undue violence, the plaintiff should reply the facts or new assign, and matter which shows that the defendant by subsequent misconduct became a trespasser *ab initio* should be specially replied. 1 Chitty on Pl. 16, Am. Ed. 620; Graham Pr. 258. In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the breaking and entering are the gist of the action and the expulsion is merely aggravation; therefore a justification will cover the whole declaration; and if the plaintiff means to insist on the expulsion, as making the defendant a trespasser *ab initio*, he must new assign it. Taylor v. Cole, 3 Tenn. 155. See also Gelston v. Hoyt, *supra*; Shortland v. Govett, 5 Barn. & C. 485; Butman v. Wright, 16 N. H. 219; Stoughton v. Mott, 25 Vt. 668; The Six Carpenters' Case and notes, Smith's Lead. Cas. 274.

The plaintiff not having specially declared by way of new assignment for the expulsion or for the sale of the goods, could have no benefit from the proof introduced by him under the counts of his declaration which were answered by the pleas; and, furthermore, the court could not properly rule out the writ of attachment on the ground that the sheriff was a trespasser *ab initio*, even if the pleadings were in a proper condition to present that question. Whether the officer becomes a trespasser *ab initio* is a question for the jury to determine upon the evidence under proper instructions from the court.

The verdict is joint against McGillis and King, and as it must be set aside as to McGillis it can not stand as to King.

As the case must go back for a new trial, we will notice the error assigned as to the admission of evidence of the value of the good will of the business.

The bill of sale from Armstrong to appellee did not purport to convey the good will of the business, and there was nothing in the sale of the stock which prevented Armstrong from opening a store adjacent to the one occupied by appellee, and continuing the business which he had theretofore conducted. Appellee had no interest in the good will, so far as the evidence shows, and there was, therefore, no basis for the assumption that he would make in the future the same profits in conducting the business that Armstrong had made in the past. The value of the goods and fixtures taken was the true measure of damages, and the jury might, if warranted in an action of trespass by the proof made, give exemplary damages to punish a wanton or malicious proceeding. No claim for such punitive damages was made in this case, however, but a claim for the value of the good will was made, and the court instructed the jury to find from the evidence the profits of the business to Armstrong during the previous year, and from that and other evidence to ascertain the value of the good will of the business, and to allow such value as damages in addition to the value of the goods. This was error. *Kussell v. Jzevor*, 2 Ill. App. 243. The value of the good will was not involved, and where the property is taken under a claim of right, the real dispute being as to the title, and the trespass is not accompanied by any circumstances of aggravation sufficient to justify exemplary damages, the law applies in all cases the same uniform measure of relief for property taken, to wit, the value of the property at the time of the conversion and interest thereon. *Oviatt v. Pond*, 29 Conn. 479; 3 *Sutherland on Dam.* 472.

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

Atkinson v. Foster.

F. M. ATKINSON

v.

FRANK FOSTER.

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68 100

Creditor's Bill—Receiver—Proxy to Vote Stock—Power of Court to Order Execution of.

Where a receiver has been appointed in proceedings on a creditor's bill, and the property assigned includes stock of a corporation, the court may order the defendant to execute a proxy or power of attorney enabling the receiver to vote the stock at meetings of the stockholders of the corporation.

[Opinion filed July 3, 1883.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Appellee recovered a judgment against the appellant, and, after the return of an execution no property found, a creditor's bill was filed against appellant, and such proceedings were had that a receiver was appointed and appellant ordered to execute an assignment to said receiver of his property. The receiver afterward, on the 31st day of August, 1887, filed his petition in the court, in which it was alleged that the petitioner was appointed receiver and that said Atkinson executed an assignment of his property in the usual form, and was at that time the owner of 450 shares of the capital stock of the Chicago Tyre and Spring Works, which then and now stands in the name of Atkinson upon the books of the company; that at the time of the appointment Atkinson was entitled to vote upon said 450 shares at all the meetings of the stockholders of the company; that petitioner as such receiver is advised that by such appointment as between him and Atkinson, he succeeded to all the rights of Atkinson in or concerning said stock, including the right to vote thereon at such meetings; that by the by-laws of the company no transfer is recognized by the company until made upon the books of the company by the

surrender of the certificate to the assignee; that the certificates of said 450 shares, or any part thereof, have not been surrendered, nor have any new certificates been issued therefor to petitioner as assignee. That by reason thereof the receiver's right to vote upon said stock at the meetings of the stockholders will not be recognized by the officers or stockholders; that the regular annual meeting of the stockholders has been called to convene September 5, 1887; that the petitioner will not be in a position to vote upon said stock unless the same be properly transferred to him upon the books of the company, or unless Atkinson shall execute to him as such receiver a proxy authorizing him to vote this stock; that he believes it to be important to the value of the stock and the interest of the estate committed to his charge that he should attend this meeting and be able to vote thereat upon this stock; that the affairs of the company by dissensions among its stockholders have become very much disordered; that there are now two rival boards of directors, each claiming to have authority to act as such; that said disorders and dissensions have resulted in the appointment by this court of a receiver of the affairs and assets of the company, at the instance of its creditors, and it has been brought to the verge of insolvency, and unless some action is taken toward electing an undisputed set of officers and directors and taking the assets from the hands of the receiver, the petitioner believes the stock will become worthless; that Atkinson, since the appointment of the receiver of the company, seems to be indifferent if not hostile to its interests; that petitioner is informed that Atkinson, shortly after the appointment of the receiver, started and is now president of another corporation known as the Atkinson Car Spring Works; that since the organization of the new company Atkinson has been working against the old, as will more fully appear from circulars which petitioner is informed and believes Atkinson caused to be printed and sent to the customers of the spring works; and petitioner believes that if defendant Atkinson were to vote said stock he would so act therein as to continue rather than remove the obstacles which have disordered the affairs of the spring works; that petitioner is in-

formed and believes that Atkinson is president of the spring works, and either Charles H. Ferry or Eli Smith is secretary and treasurer thereof; that by the by-laws the company's certificates issued for stock must be signed by the president and secretary and treasurer; that Atkinson placed the stock certificates book in the possession of his attorney, Allan C. Story.

Petitioner prays that Atkinson, as president, and Smith or Ferry, as secretary and treasurer of the spring works, be directed to issue to petitioner new certificates for 450 shares of the stock upon the surrender of the present certificates, and for that purpose that Atkinson and Story give access to the transfer certificate book, or that Atkinson execute and deliver to petitioner, within a short time to be fixed, a proxy authorizing petitioner to vote upon the 450 shares of stock at the meeting of the stockholders and any adjournment thereof, or at meetings that may be held of the stockholders, until the further order of the court, and that Atkinson be restrained from interfering with petitioner in so voting said stock under said proxy, or from voting or attempting, either by himself or his agents, etc., to vote thereon.

The petition was verified by the oath of the receiver, and had attached to it, as the exhibits referred to, copies of certain circulars. Atkinson filed his answer to the petition, in which he claimed that the note on which the judgment was taken against him as the basis of the creditor's bill, had been paid, as set forth in his answer to the creditor's bill, and he made said answer part of his answer to the petitioner.

The receiver supported the allegations of his petition by proof, and the court entered the following order:

"This cause coming on to be heard upon the petition of E. A. Filkins, the receiver in above entitled cause, filed herein on the 31st day of August A. D. 1887, asking for a transfer or proxy to vote upon certain stock therein mentioned and described, and upon the answer of the defendant, F. M. Atkinson, thereto, and upon due notice to Allan C. Story, the court having heard the counsel for the respective parties, and being fully advised in the premises, it is ordered that said defendant, F. M. Atkinson, do, before 10 o'clock A. M. on Friday, the

2d day of September, A. D. 1887, execute and deliver to E. A. Filkins, the receiver, a certain proxy or power of attorney in the following form, as near as may be:

"Know all men by these presents, that I, Frederick M. Atkinson, of the city of Chicago, county of Cook, and State of Illinois, do hereby appoint Edward A. Filkins, of said county and State of Illinois, to be my substitute and proxy for me and in my name and behalf, to vote at any election of the stockholders of the Chicago Tyre and Spring Works, a joint stock company, and at any meeting of the stockholders of said company, as fully as I might or could, were I personally present.

"In witness thereof, I have hereunto set my hand and seal the —— day of September A. D. 1887.

"Authorizing said Filkins as such receiver to vote in the name, place and stead of said Atkinson upon the 450 shares of stock of the Chicago Tyre and Spring Works mentioned in said petition and represented by certificates of stock issued by said Chicago Tyre and Spring Works to said F. M. Atkinson, and numbered 18, 19, 5, 6, 7, respectively, at the annual meeting of the stockholders of said company to be held on the 5th day of September A. D. 1887, and any adjournment thereof, and all other meetings of said stockholders, until the further order of this court, and that said Atkinson, his agents and attorneys, do refrain from interfering with said Filkins in his voting upon said stock under said proxy or power of attorney, and from voting or attempting, either by himself or by his agents, to vote upon said 450 shares of stock at said meeting, or any of them.

"It is further ordered that said defendant, F. M. Atkinson, do within five days execute upon the back of said certificates an assignment thereof in due form to said Filkins as such receiver, and that said Filkins do as soon as practicable thereafter cause said certificates to be surrendered to said Chicago Tyre and Spring Works, and new certificates issued to him as such receiver, in lieu of such certificates so surrendered, and that said defendant, the Chicago Tyre and Spring Works, by its proper officers, do upon demand of said Filkins execute and issue to him such new certificates.

“And it is further ordered that Allan C. Story do allow the proper officers of said Chicago Tyre and Spring Works access to the stock certificate book of said company for the purpose of issuing such new certificates.”

This appeal is prosecuted to reverse that order.

MESSRS. G. W. & J. T. KRETZINGER, for appellant.

MESSRS. COOK & UPTON, and TRUMBULL, ROBBINS & TRUMBULL, for appellee.

MORAN, P. J. The order appealed from is interlocutory, but is reviewable under section 1 of “An act to provide for appeals from interlocutory orders and granting injunctions or appointing receivers,” in force July 1, 1887.

The question made is as to the power of the court to compel appellant to execute to the receiver a power of attorney enabling him to vote the stock in such manner as should seem to him to be for the best advantage to the property. A receiver appointed on a creditor's bill does not merely take property and hold it for the benefit of the party finally successful, as is the case where the dispute is over the title to the property.

The receiver in a creditor's suit is appointed to take the property of the judgment debtor and dispose of it and apply the proceeds in satisfaction of the judgment under the direction of the court, and, as is said in Beach on Receivers, Sec. 639, “it is a well established rule of law that, as to all the property and rights of property of the judgment debtor and as to all lawful transactions with his property, the receiver stands only in the place of the judgment debtor.”

Where, from the peculiar nature of the property coming to the hands of the receiver, some further conveyance than the usual assignment from the debtor to the receiver is necessary to vest in the receiver the complete legal title and enable him to dispose of the property to advantage, and to protect it while he holds it, the court *ex necessitate* must have the power to compel the judgment debtor to execute such further conveyance.

From the allegations of the petition it appears that an exi-

gency had arisen, in which, without the proxy to vote the stock, the receiver would be unable to protect it against the efforts of the judgment debtor himself to render it worthless.

We think that under such circumstances the court had the power to require the judgment debtor to execute any instrument, which was necessary for the protection of the *res*. It was just and proper that the stock should be so used as that its value should not be diminished or destroyed, and it is well known that officers of a corporation who desire to accomplish that end can soon wreck a corporation, and render stock in it of no value. The receiver was the one to protect the stock by voting it at the election, and it was proper to clothe him with the legal means of doing so. The power of the court to compel the execution of a proxy or power of attorney to vote stock, has been exercised, and rests on the same foundation as its power to compel the execution of any other instrument. In *Vowell v. Thompson*, 3 Cranch, C. C. 428, a bill was filed to compel the mortgagee to give to the mortgagor a power of attorney to vote on certain stock at an election of directors of the corporation, and the court granted the relief.

We are of the opinion that the court had full power to enter the order appealed from, and that, under the circumstances, it was discreetly and providently exercised.

The order will therefore be affirmed.

Order affirmed.

GARNETT, J., took no part in the determination of this case in this court.

ARTHUR W. WINDETT

V.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY
ET AL.

Mortgages—Foreclosure—Bill in Nature of Bill of Review—Jurisdiction—Former Adjudication—Absolute Conveyance as Mortgage—Parol Agreement—Evidence.

Windett v. Conn. Mut. Life Ins. Co.

1. An original bill in the nature of a bill of review, as well as a bill of review proper, must be brought in the court in which the decree sought to be reviewed was rendered.

2. A former adjudication by a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties were bound to litigate and bring to a decision as an incident to, or essentially connected with, the subject-matter in litigation.

3. Where the mortgagor has permitted a decree *pro confesso* in the United States Circuit Court, upon a bill to foreclose a mortgage, filed in violation of an agreement to extend the time of payment, he can not maintain, in a State court, an original bill in the nature of a bill of review to redeem from the sale under such foreclosure.

4. In the case presented it is *held*: That a strong presumption arises that the former relation between the parties of mortgagor and mortgagee was terminated by the foreclosure proceedings; that the testimony to overcome such presumption must be strong, positive and convincing; and that the evidence does not sustain the contention of the complainant that such arrangement was continued by parol agreement made pending such proceedings.

[Opinion filed July 3, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. W. C. GOUDY and JOHN WOODBRIDGE, for appellant.

Messrs. ISHAM, LINCOLN & BEALE, for appellees.

McALLISTER, J. In March, 1879, Windett being indebted to the Connecticut Mutual Life Insurance Company in the sum of \$94,500 as principal, besides accrued interest, for moneys theretofore loaned to him by said company and which had been secured by mortgages given by him to said company, upon different parcels of real estate situate in and about the city of Chicago, as to which he had made default in payment, the said company, for the purpose of foreclosing said mortgages, brought two suits in equity in the United States Circuit Court for the Northern District of Illinois against him, in each of which there was due personal service of process. The first of said suits was begun March 15, 1879, and a decree *pro confesso* was entered November 23, 1880, with reference to a

master to ascertain the amount due, and July 16, 1881, the usual decree finding the amount due and for sale and foreclosure was entered. November 17, 1881, the master's sale under the decree was made, said company being the purchaser. And, no redemption having been attempted, February 20, 1883, the master's deed of the premises so sold was issued to said company as the purchaser. In the other case suit was brought March 17, 1879, in which a decree *pro confesso* and of reference was entered November 23, 1880, followed by decree finding the amount due and for sale and foreclosure entered June 22, 1881. Under that decree the master's sale was made September 23, 1881, and there having been no attempt to redeem, the master's deed was issued January 30, 1883, to said company, the purchaser at such sale. All of which proceedings were followed by the order of the court confirming the same.

June 17, 1885, Windett filed his bill in the Cook County Circuit Court against the said company, in this present suit to redeem, which appears to be framed in two aspects: First, in the aspect of an original bill in the nature of a bill of review, for the purpose of setting aside the decrees of the Federal court so far as they affect his right of redemption, on the ground that while such suits were pending, he entered into an agreement with said company to extend the time of payment of the whole indebtedness as respects principal, for five years, and to reduce the interest from the rate of nine per cent. per annum, as provided for in the mortgage, to six per cent. only, such reduction to take effect from January 1, 1878; that said company, in bad faith and in violation of said agreement, caused said decrees to be entered before the expiration of said five years and for the original, instead of the reduced rate of interest. Secondly, in addition to such agreement for extension of time of payment and reduction of interest, there was an agreement made between the parties pending said suits in the Federal court, to the effect that the defendant therein should have the right to redeem the mortgaged premises irrespective of what was done by the plaintiff in said suits, by paying the amount actually due; and that by

the assurances, promises and representations made by the officers and agents of said company to him, said Windett, that he should have such right, he had been induced to, and did rely upon the same and was thereby prevented from appearing in said cases to protect his rights or redeem said property within the time allowed by law for so doing, wherefore said company was now estopped from denying such right of redemption.

At the hearing upon pleadings and proofs the bill was dismissed on the grounds that if there had been, in fact, such an agreement to extend the time of payment of the whole principal debt for the period of five years, and to reduce the rate of interest from nine to six per cent. as was alleged, Windett should have availed himself of whatever rights he had under that agreement by coming into the cases in the United States court, at some proper time, and presenting the same to that court for its consideration, and, not having done so, he is precluded from assailing those decrees in this collateral way, because they are conclusive upon him as to all said matters. That so far as his alleged right of redemption is based upon agreement between him and the company, or said several matters of estoppel, the proof was too unsatisfactory to overcome the presumption arising from the decrees of the Federal court, and the sales and deeds thereunder. From that decree of dismissal Windett has appealed to this court.

In one respect, the bill in this case partakes of the character of an original bill, in the nature of a bill of review. The decrees sought to be reviewed were rendered by the Federal Circuit Court, and this bill is in the Circuit Court of the State. The inflexible rule is that both a bill of review proper and an original bill in the nature of a bill of review must be brought in the same court in which the decree sought to be reviewed was rendered. *Griggs v. Gear*, 3 Gilm. 10.

The court below had no authority or jurisdiction to review the decrees of the Federal Circuit Court. *Wetherbee v. Fitch*, 117 Ill. 67. The adjudication in the Federal Circuit Court was not only final and conclusive as to the matter actually determined, but as to every other matter which the parties

were bound to litigate and bring to a decision as an incident to, or essentially connected with the subject-matter of litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense. *Ashuelot R. R. Co. v. Cheshire R. R. Co.*, 59 N. H. 409, citing *Clemens v. Clemens*, 37 N. Y. 59-74; *Malloney v. Horan*, 49 N. Y. 111-116; *Cromwell v. County of Sac*, 94 U. S. 351; *Case v. Beauregard*, 101 U. S. 688; *King v. Chase*, 15 N. H. 9-15, and other authorities.

Mr. Windett claims that the contract to extend the time of payment for the period of five years, and reduce the interest from the rate of nine to six per cent., was entered into between him and said company March 18, 1879, and subsequently. It was even before his time expired for answering the bills in the Federal Circuit Court. Now, if such an agreement was in fact made, and it was valid and operative, it would control as to the question of condition broken, as respects the mortgages and the right of foreclosure, and bear directly upon the question of the amount due. Those were matters necessarily involved in those suits. He filed no answer; and when the decrees were entered, which he alleges were acts by the company in violation of said agreement and in bad faith, he became immediately cognizant of what had been done, but made no application to the court, at any time, to be relieved touching such acts. Such an application was his only proper remedy (*Brown v. Frost*, 10 Paige, 243), and not having resorted to it, the decrees in question are conclusive upon him as to that matter.

But it is contended that this case comes within the doctrine of equity allowing an absolute conveyance to be turned into a mortgage by parol evidence, and Mr. Windett claims that while the foreclosure suits were pending there was an oral agreement made between him as mortgagor and the said company as mortgagee, in substance and effect that the foreclosure proceedings should not operate as such, but that the relations between them should continue, notwithstanding such proceedings, to be that of mortgagor and mortgagee, and that he should have the right to redeem after the time for redemption

allowed by law had expired, and that he relied and acted upon that agreement. That question is the only remaining one in the case.

In considering that question under the head of equity, to which it belongs, what are to be regarded as governing rules? It is indisputable that from the decrees of foreclosure, the sales thereunder and deeds to the company as purchaser, a strong presumption arises that the former relation between the parties of mortgagor and mortgagee had been thereby terminated and that the said company had become the absolute owner of the property in accordance with the terms of the said deeds. It is a further rule applicable to such case that the burden rested upon Mr. Windett to overcome that presumption; that in order to overcome that strong presumption the testimony must be clear, positive and convincing beyond reasonable controversy. And some cases hold that the unsupported testimony of the party in interest is not sufficient to support a decree. *Howland v. Blake*, 97 U. S. 626; *Kent v. Lasley*, 24 Wis. 654; *McClellan v. Sanford*, 26 Wis. 595; *Oswald v. Sproehnle*, 16 Ill. App. 368, and cases cited.

The testimony in the case is very voluminous and conflicting. We can not undertake to state and discuss it and it would be a fruitless task if we did. But, after examining and duly considering all the evidence in the case, we are forced to the conclusion that it falls far short of being of that clear and convincing character which the law requires in such a case. The witness, whose testimony tends to prove the alleged oral agreement, was Mr. Windett himself. He claims, and which is probably true, that while his entire indebtedness under the mortgages amounted to only about \$100,000, yet the property in question was worth \$300,000, and was continually appreciating in value. His interest in the result was, therefore, very great. We can find in the record no substantial corroboration of his testimony as respects such oral agreement, either by way of facts and circumstances or direct evidence; but do find that he is flatly contradicted as to nearly every statement tending to prove such agreement, by witnesses equally credible with himself. And besides, the case shows many deliberate

acts on his part, done from time to time during the whole transactions in question, which are utterly inconsistent with the theory of the concurrent existence of such an oral agreement.

It would have been far more agreeable to our humane instincts if we could have found in this record such a case, so supported by evidence, as that, under established rules of law, Mr. Windett would have been entitled to the relief prayed; for we regard the case as one of great hardship so far as he is concerned, and the result of misfortunes for which he is in no wise responsible. But for the reasons stated the decree must be affirmed.

Decree affirmed.

J. YOUNG SCAMMON

V.

THE COMMERCIAL UNION ASSURANCE COMPANY.

Insurance—Mistake of Law—Estoppel—Practice.

In an action involving the right of the plaintiff to recover on a policy of fire insurance, the Supreme Court having reversed the judgment on the ground that this court had failed to certify whether a subsequent policy was issued in lieu of the policy in question, it is *held*: That said subsequent policy was not so issued; that the defendant issued said policy and paid the loss thereunder to a third person claiming under a fraudulent sale under a mistake of law; and that a decree settling the rights of the plaintiff and such third person, furnishes no element of estoppel that can be invoked by the defendant in this action.

[Opinion filed July 3, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. CHARLES F. WHITE and MARTIN L. WHEELER, for appellant.

Messrs. MILLER, LEWIS & JUDSON, for appellee.

MORAN, P. J. This case was heard by this court at the October term, 1886, and an opinion filed covering all the questions in the case to which the attention of the court was at that time called, which opinion is reported in 20 Ill. App. 500. After the opinion was filed the remanding order was stricken out, and a finding of facts was made, and final judgment was entered in favor of said Scammon in this court, in order that the questions of law involved might be passed on by the Supreme Court. The case was taken to the Supreme Court by appeal and the judgment of this court was at first affirmed, but on a re-hearing the judgment was reversed, on the ground that this court had failed to certify the facts as to one of the issues contested on the trial in the Circuit Court.

That issue as stated by the Supreme Court is as follows: "Whether a policy of insurance upon the same property and for the same amount, issued by the defendant to one Babcock, subsequent to the issuing of the policy upon which this suit is brought, and the loss upon which was fully paid before this suit was brought, was issued in lieu of the policy upon which this suit is brought, with the consent of Scammon." We have carefully examined the record upon the question thus presented and considered the suggestion of counsel thereon, and while we find it true that a policy of insurance was issued upon the same property and for the same amount to one Babcock subsequent to the issuing of the policy on which this suit is brought, and that the loss thereon was paid before this suit was brought, yet said policy was not issued in lieu of, or as a substitute for the one on which this suit is brought. Scammon was never consulted, and never consented that a policy should be issued to any person for his benefit or otherwise, to stand in lieu of or to be substituted for the policy on which he is now claiming.

The company issued the policy and paid the loss thereunder to Babcock, acting on a legal opinion, in which Babcock and the agent of the company concurred, that Babcock had title to the property, and that Scammon had by the sale under

the mortgage lost all title and interest therein, and the policy of insurance which Scammon held was therefore not enforceable against the company. Scammon never assented to this view, but at all times asserted to the company his ownership of the property, and his claim to the insurance on his policy. The company paid the Babcock policy with full knowledge of the facts, and the only mistake it fell into was one of law.

It is true the chancery court mulcted Babcock in the amount of insurance which he had obtained while clothed, by reason of the fraudulent sale, with the apparent title, but we fail to perceive in that circumstance a ground of defense to this suit. Such fact furnishes no element of estoppel that can be invoked by the insurance company as against Scammon in this action. The terms which the chancery court saw fit to impose on Babcock, can furnish no ground either of defense or recovery in this action of law.

We stand upon the opinion heretofore filed and above referred to on the other questions in the case, and are of the opinion that there is nothing in this additional point which should defeat Scammon's claim on the policy in suit.

The judgment of the Circuit Court will therefore be reversed and a judgment will be entered in this court for the amount due upon said policy.

Judgment reversed.

JULIUS WILLER

V.

CHARLES S. FRENCH.

Forcible Entry and Detainer—Jurisdiction—Confession of Judgment upon Warrant of Attorney in Lease, Unauthorized.

1. The action of forcible entry and detainer is a special statutory proceeding, summary in its nature and in derogation of the common law. The statute conferring jurisdiction must, therefore, be strictly pursued in the method of procedure prescribed by the statute.

2. The Circuit and Superior Courts, in taking cognizance of cases under

the statute of forcible entry and detainer, exercise a special, statutory and extraordinary power, and stand upon the same ground and are governed by the same rules as courts of limited and inferior jurisdiction. In such cases nothing is within the jurisdiction but that which expressly so appears upon the face of their proceedings.

3. The entry of a judgment by confession upon warrant of attorney contained in a lease is impliedly prohibited by the particular mode of proceeding prescribed by the forcible entry and detainer act.

4. The practice of entering judgment by confession upon warrant of attorney without process in actions of tort did not obtain at common law.

[Opinion filed July 3, 1888.]

APPEAL from the Superior Court of Cook County; the
HON. ELLIOTT ANTHONY, Judge, presiding.

A judgment in forcible entry and detainer against appellant and in favor of appellee was entered in the Superior Court by confession and without the issuing or serving of process. The lease (a copy of which is attached to the pleadings in the case) contains a clause by which the lessee appoints any attorney of a court of record "to be his attorney for him and in his name and stead, to appear in and before any court of record, at any time after any default or failure made by the party of the second part in the performance of any of the covenants of this lease, to waive the issuing and service of process, and to file a cognovit and confession of judgment for the possession of the whole of said demised premises, and for the costs of suit in an action of forcible entry and detainer in favor of said first party, its successors and assigns, and against said second party, his heirs, executors, administrators and assigns, and to file a waiver and release, in writing, of all errors in entering such action or judgment, and a consent in writing that a writ of restitution may be issued and executed immediately," etc.

A motion was made to set aside the judgment by appellant, who entered a special appearance for the purpose of making said motion. The motion was denied by the court, and an appeal taken and error assigned.

Messrs. MOSES & NEWMAN, for appellant.

MESSRS. WILLIAMS & THOMPSON, for appellee.

A warrant of attorney to confess judgment does not depend for its validity upon positive enactment of the Legislature, but is a valid power, whose exercise has been recognized repeatedly by the common law, independent of any statute.

In the Supreme Court of this State, Sheldon, J., says:

"A warrant of attorney to confess judgment is a familiar common law security. The entry of judgment by cognovit thereunder is a proceeding according to the course of the common law which courts have ever entertained in the ordinary exercise of their authority as courts of general jurisdiction. The fact that the statute has regulated the mode of procedure does not convert the proceeding into one of such a special statutory character that the same presumptions do not obtain as in the ordinary judgments of superior courts of general jurisdiction. The point was directly so ruled in *Osgood v. Blackmore*, 59 Ill. 261." *Bush v. Hanson*, 70 Ill. 480, 483.

The Revised Statutes of 1845, Chapter 78, Section 27, provide for confession of judgment for a debt *bona fide* due, but say nothing about confession on a note before its maturity. It was held, however, by the Supreme Court in 1850, that judgment might be confessed on a note not due by its terms, the power which was exercised purporting to authorize such confession. The court say: "We see no good objection to the enforcement of such a contract." "The defendant has no right to complain of the judgment, for he authorized it to be entered." Here is a case of the exercise of power to confess judgment, while an affirmative statute authorizing confessions was in existence, but where the exercise, upheld by Supreme Court, was not in accordance with provisions of such statute. *Sherman v. Baddely*, 11 Ill. 622.

The exact case at bar came up before Judge Blodgett in the United States Circuit Court. *Conn. Mut. Life Ins. Co. v. Sea*. The attorneys for the tenant, defendant, objected to the entry of judgment under a warrant of attorney precisely similar to the present, as being illegal and unconstitutional. Judge Blodgett said that if the defense could show him any authority or reason why the judgment should not be entered he was will-

ing to give them a reasonable time. The question was afterward argued and Judge Blodgett adhered to his view that judgment might be entered, and this was accordingly done. Judge Drummond took the same position.

As to general doctrine, that whatever may be done *in propria persona* may be done in court by an attorney, see Hall v. Hamilton, 74 Ill. 437.

When the regularity of sale on execution was questioned subsequently to sale, on ground that confession on which execution issued was unsupported by affidavit, Ogden, J., says:

"The Court of Common Pleas, by its common law powers, had jurisdiction over the person of the defendant, and over the subject-matter of the judgment, independent of the provisions of the statute, which directs that an affidavit shall be produced at the time a judgment by confession is signed."

Refused to avoid judgment and sale resting on warrant. Doe ex dem. Vandevere v. Gaston, 42 N. J. L. 820. See, also, Ely v. Parkhurst, 25 N. J. L. 188; Doe ex dem. Rees v. Hawell, 12 Ad. & E. 696; Locke v. Franklin, 7 Taunt. 9; Secrist v. Zimmerman, 55 Pa. St. 446.

"The amicable action and confession of judgment is according to ancient and established practice existing before the act of 1806, as well as since." Judgment in ejectment by confession, sustained. Flanigen v. City of Philadelphia, 51 Pa. St. 491. See, also, Durham v. Brown, 24 Ill. 93.

The objection that the action of ejectment rests on a tort has not been allowed to prevail in any of the numerous cases cited, and none can be found where such objection has prevailed. The true solution of the difficulty lies in the fact that, while the actions of both forcible entry and detainer and of ejectment present some suggestions of having been founded in tort, yet they are really both *sui generis*. It is misleading to call them actions in contract or in tort, for they are neither. Forcible entry and detainer resembles ejectment most closely in its processes and results, and the lines already developed in ejectment are those which should be followed in the action of forcible entry and detainer.

In the present case the record shows that the relation of

landlord and tenant existed; that the lease expired, and that the tenant persisted in holding the premises after a demand made in writing by the proper person for the possession thereof. This was sufficient to give the court jurisdiction. *Dunne v. Trustees of Schools*, 39 Ill. 578; *Smith v. Killeck*, 5 Gilm. 298.

This court, therefore, must find in the present case, that the facts necessary to give the lower court jurisdiction existed. The whole of the appellant's case, consequently, comes to this: No summons in forcible entry and detainer was issued to, or served on the (then) defendant Willer, and the statute of forcible entry and detainer is said to provide for the issue and service of summons. The Practice Act, section 1, requires that in all actions the first process shall be a summons. Will it be said, on the strength of this provision, that no judgment may be entered in any cause where summons has not issued? In this case what becomes of the constant practice of waiving the issue and service of process, as defendants so constantly do, by warrant of attorney or otherwise, and consenting that judgment be entered up?

Errors, if any, are released in power contained in lease; and in such case the Appellate Court will affirm without examination. *Frear v. Com. Nat. Bank*, 73 Ill. 473; *Hall v. Hamilton*, 74 Ill. 437.

MORAN, P. J. The complaint filed in the court below contained allegations sufficient to entitle appellee to the remedy sought under the forcible entry and detainer act. In this respect this case differs from the case of *Burns v. Nash*, decided by this court and reported in 23 Ill. App. 552. The sole question for us to determine on this record is whether the Superior Court obtained jurisdiction of the person of appellant by means of the filing of the cognovit in pursuance of the warrant of attorney contained in the lease.

It is contended by counsel for appellee that a warrant of attorney to confess judgment is a familiar common law security, and cases are cited which it is asserted show that it was the practice at common law to enter judgments in ejectment

upon confession under a warrant of attorney, and that the practice has also obtained in Pennsylvania and been sustained by the Supreme Court of that State. There is some misapprehension as to the practice at common law. There were at common law, besides the judgment by default, two methods of obtaining judgment without trial. One by a confession of judgment under a warrant of attorney, and the other upon a *cognovit actionem* signed by the defendant in the action.

The warrant of attorney authorized the attorney named therein to appear for the defendant and receive a declaration in an action for debt, and to confess the action or suffer judgment by *nil dicit* or otherwise to pass. "A warrant of attorney," says Chitty, "is more frequently given independently of any action, and very generally as prospective security, and although, at the time it is executed, nothing is due from the party. It is in that respect a convenient collateral security to bankers and others, in consideration of their agreeing to make pecuniary advances, or to suffer a customer to overdraw his account." 3 Chitty's Gen. Prac. 669.

The *cognovit actionem* was not an authority given before the action commenced, but was a confession signed by the defendant after the process was issued.

"When a writ has already been issued against a defendant, a *cognovit actionem*, or, in other words, a written confession of the action subscribed by the defendant but not sealed, and authorizing the plaintiff to sign judgment and issue execution for a named sum, is a very usual mode of saving the expenses of further proceedings in the action." 3 Chitty's Gen. Prac. 664. Now, two at least of the cases cited by counsel to show that confession of judgment was permitted in ejectment, are cases in which the judgments were entered on a *cognovit actionem*.

In *Doe dem. Locke v. Franklin*, 7 Taunt. 9, the plaintiff obtained from the defendants in possession a *cognovit* of the action, and a *retraxit* of the plea, so that not only was there no warrant of attorney to appear and confess, but the defendants who did confess the action were already in court, by service of process, and also by plea filed. *Doe dem. Rees v. Howell*, 12 Adol. & E. 696, was also a case where the defend-

ant signed a cognovit confessing the action. These cases give no support to the contention that a warrant of attorney to appear and confess judgment was a recognized mode of procedure in ejectment at common law.

Kingston v. Kingston, 1 Dow, N. S. 263, appears to have been a rule *nisi* to set aside a judgment entered upon a warrant of attorney in an action of ejectment, for the reason that there was no attestation clause to the warrant of attorney in conformity with a statute then recently enacted. Patteson, J., held that the statute had no application to actions in ejectment, and in that was clearly wrong, as the same statute was held applicable to actions of ejectment in *Doe dem. Rees v. Howell*, *supra*, where the question was decided by four of the judges of the Court of King's Bench.

The point as to the right to enter the judgment under a warrant of attorney was not raised in the case, but the implication that it was a recognized practice, which might be drawn from the fact that the point was not made, is negatived in the subsequent case of *Beaumont v. Beaumont*, 2 Dow N. S. 972, where, in moving for leave to enter up a judgment on a warrant of attorney authorizing the landlord to sign judgment in ejectment, upon the determination of the tenancy by a notice to quit, counsel admitted that no case of a similar description was to be found in the books, but contended there could be no objection to such a warrant of attorney. Coleridge, J., said: "If a party enters into such an agreement, I see no reason why it should not be enforced;" but for lack of a sufficient affidavit no judgment was entered in the case, and therefore it is no precedent, but it shows that as late as 1843 no such practice had obtained in England.

The fact that no reference to such a method of proceeding in ejectment is found in works on common law practice (so far as we have been able to examine), goes to show pretty conclusively that such a practice was unknown to the courts and to the profession.

It appears from cases in Pennsylvania that there is known in that State a practice of entering what are termed amicable actions, and that such actions and judgments by confession in

Willer v. French.

them may be entered by the court on agreement by the parties. *McCalmont v. Peters*, 13 Serg. & R. 196; *Cook v. Gilbert*, 8 Serg. & R. 567.

In *Flanigen v. The City of Philadelphia*, 51 Pa. St. 491, the lease provided that it might be terminated on the violation of any covenant by a notice of five days, and that on such termination any attorney might sign an agreement for entering an amicable action in ejectment against the lessee. Such an action was entered and judgment confessed, and on motion to set it aside on the ground that it was not entered in compliance with a rule of court governing the entry of judgment on warrants of attorney, the court said: "It nowhere appears in this record that the confession by the attorney of the defendant was in pursuance of a warrant of attorney. The amicable action and confession of judgment is according to ancient and established practice, existing before the act of 1806, as well as since."

The practice seems to be peculiar to the State of Pennsylvania; at least, our attention has not been called to a similar practice elsewhere. We do not think it can be regarded as establishing the proposition that the practice of confessing judgment upon warrant of attorney and without process having issued obtained at common law in actions of ejectment.

In *Secrist v. Zimmerman*, 55 Pa. St. 446, cited by counsel, there was no warrant of attorney and no question of a confession on a warrant of attorney made or decided in the case. The action of ejectment was brought against the defendant for the land, and a year after its commencement the defendant confessed judgment to the plaintiff for the land in dispute and costs. The court held the judgment conclusive as to the parties and their privies, on the ground that the most important interests, not only of property and liberty but life itself, are habitually concluded, judicially, by solemn confession made by the party in interest in the face of a court of justice.

The confession of which the court is speaking in that case was made in open court in the face of the court after service of process, and it has never been doubted that such a confession would authorize the judgment, and probably no one

would say that such a confession would not be good in a forcible detainer case.

An examination of all the cases counsel have been able to find seems to us to confirm what was said by this court in *Burns v. Nash*, *supra*: "That the practice of entering judgment by confession upon warrant of attorney without process in actions of tort did not obtain, and there is no precedent for it, at common law."

The practice of entering judgments in debt on warrants of attorney is very old, so old that the date of its origin is unknown. Chitty says: "How or when this peculiar security for a debt authorizing a creditor, as it were, *per saltum*, to sign a judgment and issue execution, without even issuing a writ, was first invented, does not appear, but it has now become one of the most usual collateral securities on loans of money, or contracts to pay an annuity and for debts, but usually accompanied with some other deed or security." 2 Gen. Practice, 334.

It was early found that unconscionable advantage was taken of debtors by creditors by means of such warrants of attorney obtained when the debt was incurred, and when the debtor was hopeful, and executed with harshness against him in the hour of his distress, and the courts were compelled to prescribe rules and the Parliament to enact statutes to limit the operation of such warrants and restrain the injustice to which the use of them frequently gave rise. But if it were established that confession of judgment upon warrant of attorney obtained as a practice at common law in an action of ejectment, or in other actions in form of tort, it would not authorize the practice in an action of forcible entry and detainer under the law of this State. This action is a special statutory proceeding, summary in its nature and in derogation of the common law, and it is a rule of universal application in such actions that the statute conferring the jurisdiction must be strictly pursued in the method of procedure prescribed by it or the jurisdiction will fail to attach, and the proceeding be *coram non judice* and void. *Davis v. Davis*, 115 Pa. St. 261; *Burns v. Nash*, *supra*, and cases there cited.

While forcible entry and detainer is a civil proceeding for restitution, it is based upon, and has by modern legislation been evolved from the English forcible entry and detainer which was a criminal proceeding merely. Ejectment, from its slow progress, was an inadequate remedy to a landlord, and the Legislature provided the summary remedy by which a speedy recovery of possession may be secured, but to prevent hasty action, and to secure tenants and their families from the danger and inconvenience of being forcibly ejected without notice and reasonable time for preparation, certain safeguards were provided by the statute.

A demand for possession is required to be made upon the tenant before the commencement of the action; a complaint in writing must be filed before summons issues; service of the summons is to be made in a manner different from the service in other actions at law, and if judgment is rendered against the tenant, the statute provides that "no writ of restitution shall be issued in any case until the expiration of five days." There is in the statute a policy discernible, as was said by Mr. Justice McAllister in *Burns v. Nash*, "based upon humane considerations of oppression and hardships which might issue, if families, in any kind of weather, at any time of day or night, be forcibly ejected from their homes with all their effects, without notice or warning," which forbids the conclusion that a landlord, by exacting from his tenant a power of attorney in his lease, can obtain the right to an immediate judgment without having demanded possession, or having process issued or served, and to an immediate writ of restitution, and to avail himself of the remedy against his tenant furnished by a statute, every provision of which with reference to procedure he has set aside by contract, and thus to proceed to the ejection of the occupants and the recovery of possession "by leaps," as the creditor was enabled by a similar warrant to sign judgment and issue execution against his debtor at common law, without affording an opportunity to the tenant of raising any objection or making any defense. What wrong might be perpetrated were such a practice to be established is illustrated by the operation of the "amicable ejectment" proceed-

ing in Pennsylvania, as shown in Grossman's Appeal, 102 Pa. St. 137, where, after the death of the lessee and the acceptance of a month's rent in advance from his widow and before the expiration of the month, the landlord, on an unfounded rumor that the widow had assigned the lease and thus broken the covenant against assignment, confessed a judgment against the dead man under the terms of the lease, and without previous notice of the judgment or execution, the widow and heirs were dispossessed "at the early hour of eight o'clock in the morning in February."

Whatever may be thought of the public policy of such a practice, it can not become engrafted upon our forcible detainer proceedings without the consent of the Legislature.

The act provided a new remedy and the course of procedure to obtain it, and no remedy or mode of procedure can be pursued except that directed by the act. "If the act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other remedies and modes are excluded." *Miller v. Taylor*, 4 Burr. 23 and 24; *Smith v. Lockwood*, 13 Barb. 217.

Parties can not, by their contracts, vary the procedure in courts of justice prescribed by the statute. This was expressly decided by the Supreme Court of Iowa in a case which we consider in point and decisive of the question under consideration. A judgment was entered up in the District Court under a warrant of attorney in a judgment note made in Pennsylvania, which authorized any attorney in any court of record within the United States, to confess judgment against the maker of the note. A petition was filed by the maker of the note to have the judgment declared void, and the court so ordered. On appeal, the Supreme Court said: "It is claimed by appellant that the principles of the common law authorizing a warrant of attorney to confess judgment are in force in this State, and that the provisions of our code respecting the recovery of judgment by action and confession of judgment are merely cumulative. We do not think this position is correct. The whole subject of recovery and rendition of judgment is fully reviewed in the code, and the course to be

pursued in obtaining a judgment is specifically pointed out.
* * * A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another State must do so in accordance with the laws of this State. *Parties can not, by contract made in another State, engraft upon our procedure here, remedies which our laws do not contemplate nor authorize.*" Hamilton v. Schoenberger, 47 Iowa, 385.

A fortiori, parties within the State can not, by contract, engraft upon the procedure prescribed for a summary proceeding, a remedy or a practice, not warranted by the statute. While parties by consent may waive rights, they can not thus amend the law. A fundamental requisite to the validity of a judgment is that the court should have had jurisdiction of the subject-matter and of the parties.

A judgment against a defendant who has not been served at all with process and who has not appeared, is a nullity. The record shows no process to the defendant and no appearance by him, but shows a departure from the course specifically pointed out by the State, and an attempt to give jurisdiction of the defendant and enter judgment against him in a manner which the statute does not contemplate nor authorize. A confession of judgment upon a warrant of attorney in an action of forcible detainer in a court of record is as irregular and unauthorized as it would be in a justice court. Such court of record does not proceed in forcible detainer by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is therefore to be treated as a court of special and limited jurisdiction. Phillips Ev., p. 946, Cowen & Hills' Notes; Burns v. Nash, *supra*.

A court of special and limited jurisdiction, like a justice court, has no authority to enter a judgment by confession on a warrant of attorney, even in a case where such judgment would be authorized in a court of record by the common law. Alberty v. Dawson, 1 Binn. 105.

From no point of view are we able to sustain the authority of the court to enter the judgment appealed from. We have carefully examined the question and re-examined the views

expressed in the opinion of Mr. Justice McAllister in *Burns v. Nash, supra*, and such re-examination has tended to confirm us in the position there announced. The court had no power to enter the judgment in this form of proceeding on the warrant of attorney contained in the lease, and the judgment is therefore *coram non judice* and void, and must be reversed.

Judgment reversed.

WILSON AMES

V.

ROBERT MOIR & COMPANY.

Limitations—Contract in Writing—Evidence—Instructions.

1. There may be a contract in writing although it contains no express promise to pay the consideration. Where a state of facts is acknowledged in writing to exist, which imports an obligation to pay, the law implies a promise but the contract is not thereby reduced to parol.
2. The court may properly refuse to give an instruction which states an abstract proposition of law.

[Opinion filed July 3, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. JOHN G. REID, for appellant.

Messrs. EDSALL & EDSALL, for appellee.

GARNETT, J. This is an action of assumpsit for goods sold and delivered, commenced January 13, 1886, by appellees against appellant, on the following instrument:

"Contract.

CHICAGO, June 9, 1870.

"I have this day bought of Robert Moir & Co. one hundred (100) barrels highwines, 'iron bound,' at one dollar and

27	88
41	433
27	88
33	132

Ames v. Moir & Co.

seven cents (\$1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days notice, and if not called for by the 20th July, the seller has the privilege of delivering up to the end of July by giving three days notice. To be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of three hundred dollars will be put up by both parties.

“WILSON AMES.”

The principal point made on this appeal is that the instrument is not a contract in writing or an evidence of indebtedness within the scope of Sec. 1 of the act of November 5, 1849, prescribing a limitation of sixteen years, but that it is governed by Sec. 2 of that act which makes five years a bar. This question is directly presented by the 4th and 5th pleas, to which the court below sustained a demurrer.

The argument for appellant assumes that the essential elements of a contract are not to be found in the paper in question. By its terms, the names of both parties, the description of the property forming the subject-matter of the bargain, the price per proof gallon, and the terms, are accurately set forth. The opening sentence of the contract states that Ames has bought of Robert Moir & Co. one hundred barrels of high-wines at \$1.07 per proof gallon. That means, that at some time before the writing was made, a bargain was entered into between these parties. If the first agreement was by parol on the part of appellees, it was a valid consideration for Ames' written agreement. The sufficiency of the consideration is not affected by any conditions the parties chose to attach to the contract. The signing by Ames only, and the necessity for parol proof to establish his liability, makes no material difference in this case. *Hooker v. Hyde*, 61 Wis. 204; *Prenalt v. Runyon*, 12 Ind. 174.

The decision in *Dunning v. Price*, 56 Ill. 338, is in point. The contract sued on in that case was as follows:

“\$268.

AURORA, January 22, 1858.

“Be it known that in May, 1856, Edward H. Price assigned

to me a certain judgment against Jonah F. Keene, and whereas said judgment is about to be settled by the note of David and Edgar Keene secured by mortgage on lands in DeKalb county, this is, therefore, to certify that the portion of said judgment, now equitably belonging to said E. Price, is two hundred and sixty-eight dollars, which I promise to pay him so soon as said note shall be collected of said D. and E. Keene, with interest from date.

J. D. DUNNING."

To fix Dunning's liability it was necessary to show by parol proof that the note of David and Edgar Keene was given. The contract only states that it was *about* to be given. There was no *existing* indebtedness until he received the note and collected it. Yet, the court held the plea of the statute of limitations of five years could not be sustained. See also Ill. Cent. R. R. Co. v. Johnson, 34 Ill. 389.

It was held in *Abrams v. Pomeroy*, 13 Ill. 133, that a contract of guaranty, signed only by the guarantor, was a written contract, and could not be varied by parol.

There may be a contract in writing, although it contains no express promise to pay the consideration. Strictly speaking, there is no such express promise in Ames' contract. But when a state of facts is acknowledged, in writing, to exist, which imports an obligation to pay, the law implies the obligation, but the contract is not thereby reduced to parol. *Ashley v. Vischer*, 24 Cal. 322. Such a contract is found in the pass-book of a depositor in a bank. The entries in the book are not express promises to pay, but the law implies such promises, and the liability thereunder has been held not to be barred in five years. *Jassoy v. Horn*, 64 Ill. 379.

All the instructions asked by appellant and refused, except two, were erroneous. The appellant's instructions, numbered 5 and 16, contain mere abstract principles of law, and, although correct in themselves, having no reference to the evidence and containing no hypothesis upon which the jury was to find, they were apt to mislead, and their refusal was not error. *Vigus v. O'Bannon*, 118 Ill. 336; *International Bank v. Jones*, 20 Ill. App. 125.

Of the other points urged by appellant, it is sufficient to say that, on careful examination, we find them all untenable.

The law of the case was fairly presented to the jury by the instructions given, the verdict is fully sustained by the evidence, and, there being no error in the record, the judgment of the Superior Court will be affirmed.

Judgment affirmed.

FIREMEN'S INSURANCE COMPANY

v.

CHARLES E. PECK.

27	91
87	538

Corporations—Transfer of Stock—Refusal to Allow—Action for Damages—Competency of Witness—Sufficiency of Evidence to Support Finding—Practice.

1. Where the trial was without a jury, and it does not appear from the bill of exceptions that the defendant excepted to the finding or moved for a new trial, he can not, in this court, challenge the sufficiency of the evidence to support the finding.

2. In an action by the assignee of a certificate of stock against a corporation to recover damages for the wrongful refusal of the defendant to allow a transfer on its books, the death of the original holder of such certificates does not render the plaintiff incompetent as a witness.

[Opinion filed July 3, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Messrs. GEORGE R. GRANT and EDWARD ROBY, for appellant.

Messrs. WILLIAM C. WILSON and DAVID L. ZOOK, for appellee.

Per Curiam. This was an action on the case brought by appellee against the insurance company, appellant, to recover

damages for the wrongful refusal of the latter to allow a transfer on its books of thirty shares of its capital stock, of \$100 each, for which it had issued a certificate in the usual form to one Louise B. W. Bowen, as paid-up stock, who had indorsed said certificate in blank and which appellee had taken of one S. P. Walker for a valuable consideration, *bona fide*, and, having filled up said blank with an assignment to him, appellee, he demanded of appellant the making of such transfer on its books, which the latter refused. The defendant having pleaded the general issue, the case was, by agreement of the parties, submitted to the court for trial without a jury, and the court finding the defendant guilty, assessed plaintiff's damages at \$5,000, for which judgment was given with costs, and defendant took an appeal to this court.

The entire discussion on behalf of appellant relates to the error assigned, that the judgment was against the law and the evidence, and that plaintiff was an incompetent witness in his own behalf.

It does not appear from the bill of exceptions that the defendant either excepted to the finding of the court, or made a motion for a new trial. That being the case, the defendant is precluded in this court from challenging the sufficiency of the evidence to support the finding. Neither does it appear that any propositions of law were submitted to the court by either party.

We do not find, nor are we able to perceive any ground of objection to the competency of the plaintiff as a witness; the ground that the original holder of the certificate having died, rendered plaintiff incompetent, is not tenable.

We are of the opinion that there is no available error in this record, and that the judgment should be affirmed.

Judgment affirmed.

THE NEW YORK AND CHICAGO GRAIN AND STOCK EX-
CHANGE

V.

THE BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL.

*Board of Trade of City of Chicago—Market Quotations—Control of—
Injunction.*

1. The charter of the Board of Trade of the City of Chicago imposes upon that body no duty of a public nature. The individual business of each of its members is private, and their aggregate business is of like character.

2. There can be no public policy controlling any course of business unless some public interest will be affected by the failure of such control.

3. The Board of Trade of the City of Chicago, may collect the market quotations on the floor of its exchange, send them to the telegraph companies as its private dispatches to persons named as its correspondents and prohibit such companies from transmitting them to any person except those so designated.

4. A person who is not a member of the board, but has been on its list of correspondents, is not entitled to an injunction to prevent the removal of the "ticker" from his office, and to compel the board to continue to furnish him its market quotations.

[Opinion filed July 19, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon.
LORIN C. COLLINS, Judge, presiding.

Prior to August 29, 1883, the Board of Trade of the City of Chicago, permitted the agents of the Western Union Telegraph Company and other telegraph companies to have access to the floor of its exchange room for the purpose of collecting the market quotations of grain, provisions, etc. Wires were connected with the exchange room and the quotations thus secured were sent therefrom by the operators of the telegraph companies to all their customers who were willing to pay for the service. Several years before the date named, the telegraphic instrument known as the "ticker" was brought into

VOL. 27.] N.Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade.

use, its advantages being that it automatically registered the quotations in print, and could be placed in the office of each customer and connected with the wire at the exchange, so that each fluctuation in the market might be instantaneously transmitted to every customer having one of these instruments. The Gold and Stock Telegraph Company, having acquired a monopoly of the "ticker," it made some arrangement with the Western Union Telegraph Company, by which the latter at the time this suit was commenced and for some time previous, had control thereof. One of the instruments was placed in the office of the plaintiff in error and was in use by it when the suit was commenced.

On August 29, 1883, the Board of Trade adopted new rules, one of which ordered that its board of directors should provide a corps of market reporters to ascertain the current market price of commodities dealt in by the members of the board, and all changes that might occur in the same from time to time; that such reports should be frequently communicated by telegraph to such correspondents as might be willing to pay necessary charges for compiling and transmitting them under such regulations as the directors might make with any telegraph company; that the forwarding of such reports to any firm, individual or corporation should be only on condition that it was an accommodation service to be performed at the pleasure of the board and discontinued with or without notice.

About the time this rule was adopted the agents of the telegraph companies were excluded from the floor of the exchange, and the board, by its employes, took charge of the telegraphic instruments and wires on the floor of the exchange and the collection of the market reports and the forwarding of the same from the floor to the companies, the latter being prohibited from sending the quotations to any person—firm or corporation except such as the board should approve.

About December 1, 1884, a new plan was adopted. The board then made arrangement with the companies that it would telegraph to them every morning the names of all the correspondents, and through the day would send from the ex-

change the fluctuations in the market collected by its employes, which the companies were immediately to telegraph to each of the correspondents and none other; at the close of the quotations the name of the Board of Trade was to be sent by telegraph, so that the day's dispatch, though sent in fragments, was to be treated and considered as a continuous private dispatch from the board to each of said correspondents. The companies were to pay the board for the information thus collected and furnished the sum of \$750 per month, while the collection of the news cost the board about \$10,000 a year. The companies collected from the correspondents such compensation as they agreed upon, the Board of Trade having nothing whatever to do with the same.

Shortly before this suit was commenced, the board struck from its list of correspondents the name of the plaintiff in error, and the companies threatened to remove the ticker from their office, and to sever their telegraphic connection. The bill in this case was filed to prevent the execution of that threat and to compel the defendants in error to continue to furnish such information to the plaintiff in error, it being ready and willing to pay therefor, and to comply with all reasonable rules and regulations in regard to the same, and to declare void the contract which prohibited the companies from sending the quotations to others than those designated by the Board of Trade.

A preliminary injunction was granted, but on the final hearing was dissolved and the bill was dismissed for want of equity. The New York & Chicago Grain and Stock Exchange sued out this writ of error to reverse that order.

MESSRS. BISBEE, AHRENS & DECKER, for plaintiff in error.

The question is squarely presented whether, under any circumstances, the defendant corporation can be prevented from monopolizing the information as to the changes and fluctuations of the market of the Board of Trade of Chicago, or, otherwise stated, whether they can be required, if they disseminate this information to some for a consideration, to treat all alike.

We contend that the franchises of the Board of Trade have for a term of years been so exercised, and the course of business among its members has been such, that there has resulted a standard market for agricultural products, and that the methods adopted for indicating that market and collecting news and information in relation to its fluctuations to be sent abroad for the use of merchants, have been such as to create a property value in such market news and information, and that the market news and information, and the market itself and all the appliances used in the course of business by which such market results, and by which such market information is created and transmitted, are affected with a public interest, so that the Board of Trade itself can not discriminate as to the parties who shall receive the same.

We contend that the same principle applies to the market information as collected and transmitted independent of its relations to the exchange hall or other business appliances of the Board of Trade, or to the rights and privileges of the members of the Board of Trade. In other words, a species of property has been created—by the creation of the market and the collection of the information relating to that market, and the practice of disseminating such information—in the market news, and information so collected and disseminated, which property is so affected with a public interest that it can not be used for purposes of monopoly or discrimination. *Kiernan v. Manhattan Co.*, 50 How. Pr. 194.

We contend that whatever view may be taken of the rights of the Board of Trade to monopolize its market and market information to its membership while in the transaction of their business on the floor of exchange, it can not, by contract or otherwise, clothe the information in regard to such market, when placed in the hands of the telegraph companies, with any limitation; that the market news or information, when transmitted to the telegraph companies, is of a public nature, and the telegraph company can not use its franchises in the protection of such a monopoly.

We contend that the methods adopted by the appellees, although intended to avoid the law and to transform the mes-

N. Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade

sages over the circuits of the telegraph company into private messages, failed to accomplish the intended result.

Underlying our first position, and more or less entering into the others, is the doctrine of Hale in his *De Portibus Maris* to the effect that whenever private property of whatever kind is used in such a manner as that the public interest is affected by it, then reflexively the property or franchise, or whatever it may be, is also affected with a public interest and ceases to be *juris privati*.

The application of the doctrine that both the court and the Legislature may regulate with reference to private property affected with public use, so as to prevent discrimination, monopoly, or injury to the public welfare, has in recent years, by the activity of scientific investigation and the wonderful progress in the mechanical art, been largely extended, and by numerous recent decisions the courts have taken almost uniformly the position that this doctrine ought to be applied to all changes and to all conditions, however new, if the public welfare requires its application. *Munn v. Illinois*, 94 U. S. 113; *Hooton v. State*, 105 Ind. 250.

The common carrier is regulated because its property is affected with the public use just as a wharfinger or warehousemen are made subjects of both judicial and legislative control. No matter what the business may be called, the principle in every case is this: that no man can so use his property or his rights as to make it a matter of public interest that there should be no discrimination or monopoly whereby one person or corporation should be favored above another person or corporation, without submitting himself to the control of both the Legislature and, in the absence of legislation, to the jurisdiction of the proper court, to prevent such monopoly or discrimination, and to prevent any use of such property or such franchise as would be prejudicial to public interest. *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Pensacola Telegraph Co. v. W. U. Telegraph Co.*, 96 U. S. 9; *State v. The Bell Telephone Co. and others*, 36 Ohio St. 296; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 239; *The American Rapid*

Vol. 27.] N. Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade.

Telegraph Co. v. The Connecticut Telephone Co., 44 Am. Rep. 237.

An examination of the sources of the doctrine which alleges that the courts may interfere and prevent monopoly and unjust discrimination in the use of private property under certain circumstances, will show very clearly that the real question is, has a person or corporation so used his or its property that the public welfare requires that there should be no discrimination? It was and is always a question of monopoly. Monopolies have always been abhorred by the law; they are against the best interests of the commonwealth. Wherever a monopoly would be injurious to the public interest there is found a case where property or franchise has become affected with a public interest. That is what is meant by saying that property has become affected with a public interest. No matter what a man's business may be, if he pursue such a course of business and gather around him circumstances and bearings until the manner in which he treats his customers has become a matter of public welfare, until it is within his power to monopolize his business to the prejudice of the public interest, then, and always under such circumstances, the property and appliances and results of such business are within the principle. *Allnutt v. Inglis*, 12 East, 527.

The doctrine we contend for has nothing whatever to do with corporations as such. The question whether the corporation is a public or private corporation in the sense implied in that opinion, has not the remotest relation to the question under consideration. It is simply a question whether in this case the appellees have so used their property, so conducted their business, that by allowing them to discriminate they can enforce a monopoly to the injury of the public. No matter what the nature of their corporation may be, no matter what the nature of their business, it comes back to this question of public interest, as in the case of ferries, wharves, warehouses, elevators and telephones. On this basis alone we have proposed to discuss this case, and we contend that if we can show upon the facts in this case, either that the Board of Trade has so conducted its business with reference to the pub-

lic, that market information has become a public interest, or that the telegraph companies have so conducted their business in collecting the market information or transmitting it for the use of the public that by now becoming a party to discrimination in reference to persons and corporations desiring such information, a monopoly injurious to the public welfare would be created, we establish thereby that the appellees are entitled to the injunction prayed for in their bill, and that it was error in the court below to dismiss appellee's bill for want of equity. The general rule in regard to all such corporations is, that they can not discriminate against anybody. To allow them to discriminate between persons would be to open the door to the establishment of monopolies more dangerous than any that have heretofore threatened the welfare of the people. If these companies can discriminate under any circumstance or pretense whatever, between persons in the community, they may enrich some and impoverish others. Relieve them from the force of this salutary rule and they would soon exercise a power which would be adequate to almost any purpose of oppression. Therefore all contracts or stipulations, whatever may be their form, and all understandings, shifts and devices that may be adopted to justify or protect or cover such an exercise of authority, should be construed by the court as void, being against public policy. *Horner v. Nevens*, 7 Bing. 743; *Craft v. McConough*, 79 Ill. 346.

Mr. SIDNEY SMITH, for the Board of Trade of the City of Chicago, defendant in error.

The question, and the only question presented by this case, is this: Has the Board of Trade of the City of Chicago the right to determine what telegraphic dispatches it will send directly from its hall of exchange during business hours and to whom it shall send them; or, whether it will send any dispatches whatever? In other words, whether this corporation, which is purely a mercantile association, has the power to control its own private dispatches relating to the private business of its members. The Board of Trade of the City of Chicago existed as a voluntary, unincorporated association for years before it became incorporated; and it was incorporated, not for

VOL. 27.] N. Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade.

the purpose of conducting business as a corporation, but merely for the purpose of affording better facilities to the members in the conduct of their private business, and in their dealings with each other. It is safe to assert that this is strictly a private corporation, and that both the individual and aggregate business of its members is as essentially private business, since, as before, its incorporation. Courts have held that telegraph companies chartered for the purpose of conducting the business of transmitting news or information with powers of eminent domain, etc., are, so to speak, common carriers of news or information, and, therefore, are bound to serve all alike who choose to employ them, not in gathering information, but transmitting to such party as the employer shall name, such information as he himself may desire. The Chicago Board of Trade is neither a news gatherer nor a news carrier for the public. Such a business, if assumed, would be outside of the objects for which it is incorporated. It can not, therefore, be chargeable with the duty either of collecting or transmitting market reports or news to any or all, not members of the association, who may choose to employ it in such service. And so the Circuit Courts of the United States have held. *Pub. Grain & Stock Ex. v. Board of Trade*, 15 Fed. Rep. 847; *Marine Grain & Stock Ex. v. Same*, 22 Fed. Rep. 23; *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 826.

And I am aware of no reported case to the contrary.

The Board of Trade of the City of Chicago, a strictly private corporation—an association of merchants for the conduct of the private business of its members—at great expense, defrayed by assessments, having furnished an exchange hall exclusively for the use of its members, and where their business with each other, and through them the business of their principal (when they deal on commission), is transacted, has established this rule in relation to the collection, compiling and transmitting to its own correspondents, or rather, the business correspondents of its members, market news or statistics. This ingenious device, recently invented, by which the complainant and others are seeking to obtain these reports, and thus to obtain the benefits of membership without becoming members,

with the attending burdens, can not be sustained upon any known principle of law or justice.

GARNETT, J. The question presented by this record is whether the Board of Trade of the City of Chicago has the right to collect the market quotations through its employes on the floor of its exchange, send them to the officers of the telegraph companies as its private dispatches to persons named as its correspondents, and prohibit the companies from transmitting them to any person except those designated by its directors.

The Board of Trade was organized as a private corporation in 1859, and has since continuously conducted its affairs for the benefit of its members only, having no pecuniary interest in the operations taking place on its exchange. Its charter is framed in such terms as we should expect to find in the case of an ordinary private corporation, in whose affairs no one is especially interested except its own members. It has grown into an institution of vast commercial influence, and the quotations of prices coming from its exchange may justly be regarded as a potential factor in fixing market values of the necessities of life. The growth of the corporation in power and influence does not change its character. Its charter does not impose upon it any duty of a public nature, nor has it assumed any. The interest of its members has been its object from its beginning. It has the right to collect the market quotations or refuse to do so. Having chosen to procure this information, it may dispose of it as its board of directors may order. The expense of compiling the quotations is ultimately borne by the members of the corporation. They, being charged with the expense, should, in all fairness, have the advantage of controlling its distribution. The news so gathered is a species of property (*Kiernan v. Manhattan Q. Tel. Co.*, 50 How. Pr. 194), which the corporation holds and disposes of as a *quasi* trust fund. If the trust is abused or the commands of the directors are disobeyed a member may be entitled to relief on the same principle that any beneficiary of a trust fund may prevent its perversion. But the rights of a member can not be acquired by one who has not submitted to the burdens and conditions of member-

VOL. 27.] N. Y. & Chi. Grain & Stock Exch. v. Chi. Bd. of Trade.

ship. Admission to membership is necessarily a matter vested in the discretion of the board. The validity of its rules and regulations within the scope of its charter can not be denied. One of the rules makes any person of good character and credit, and of legal age, eligible as a member, on presenting a written application indorsed by two members stating the name and business of the applicant, after ten days notice of such application has been posted on the bulletin board of the exchange and approved by at least ten affirmative votes of the directors, and on payment of an initiation fee of \$10,000, or presentation of an unimpaired or unforfeited membership duly transferred, and signing an agreement to abide by the rules, regulations and by-laws of the association. We are unable to say there is anything unreasonable in this rule. If it is valid it excludes every person from the benefits of membership who has not conformed to the prescribed terms, and courts have no authority to interfere in the premises. Another of its rules provides for the collection by its employes of the quotations, and their transmission only to such persons as the directors may approve. The rule might have directed that the reports be sent to no person except members, and no just complaint could have been made. In two cases this rule, reserving to the board the power of discrimination in the distribution of its market reports, has been judicially passed upon, and in both instances the power of the board has been upheld. *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 825; *Marine G. & S. Exchange v. W. U. Tel. Co.*, 22 Fed. Rep. 23.

There can be no public policy controlling any course of business unless some public interest will be affected by the failure to control. It is true that the producers and consumers are alike interested in current prices of the great staples which change hands at this point; but the producer and consumer meet face to face, in the persons of their respective brokers, in the operations of the exchange. The market news is equally accessible to both. The agent represents the principal and is liable to him for any neglect or failure in duty which brings him a loss. The instantaneous news which the appellant contends it has the right to receive from the tele-

Andrews & Co. v. Chandler.

graph company, may not reach the principal except by the slower methods of newspaper publication, but his representative, the broker, is at all times in immediate contact with it, and is bound to use it to the best advantage for his principal.

These reports are compiled at the expense of the members of the association and are their private property in their associated capacity. There is no just principle which can deny them the right to name the parties to whom they shall be sent by the instantaneous or any other method. The individual business of each of the members is of a private character; the aggregate business of the members is not of a different character. They have in effect agreed among themselves to regulate the transmission of the telegraphic dispatches relating to their private business, and their competitors in business, who do not choose to become members and pay their fair share of the expenses of procuring this information, should not be allowed to dictate its disposition.

The order of the court below dissolving the injunction and dismissing the bill will be affirmed.

Order affirmed.

A. H. ANDREWS & CO.

V.

P. R. & F. R. CHANDLER.

Fixtures—Opera Chairs—Intention—Rights of Mortgagees—Preliminary Injunction—Dissolution of.

1. Whether articles which are attached to a building and can be removed without injury become part of the realty or remain movable fixtures, depends upon the intention of the party affixing them.

2. Upon a bill filed by the mortgagee in a mortgage on an opera house to enjoin the foreclosure of a chattel mortgage on the opera chairs contained in such opera house, it is *held*: That it was the intention of the mortgagor that the chairs should remain personal property; that the rights of the complainant are not affected by the giving of a new chattel mortgage upon the expiration of the first; that under the state of facts disclosed by the record the preliminary injunction should be dissolved.

[Opinion filed August 1, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Appellees filed their bill of complaint on which a preliminary injunction was granted. The bill alleged: That on April 20, 1885, John B. Lanyon, being the owner of lots eleven and twelve, etc., in Town of Lake, Cook County, Illinois, and being desirous of improving the same with a building to be used as an opera house, applied to orators for a loan of \$9,000, to be used in making such improvements; that in compliance with such application orators advanced \$9,000; that Lanyon delivered to orators three notes for \$3,000 each, due in one, two and three years after date, and to secure payment of the same made and delivered to orator, F. R. Chandler, as trustee, a trust deed of said lots; that during the year 1885, Lanyon erected on said lots an opera house building; that the upper portion thereof was improved as and for an opera house to be permanently used for giving public theatrical entertainments; that in order to meet the demands of the modern public, Lanyon placed upon the floor of said room 796 opera chairs of a mechanical construction peculiarly adapted for use in an opera house; that said chairs were of a character intended to be permanently attached to the floor of said opera house as a permanent fixture; that said chairs were so placed upon the floor of said opera house during its construction and were securely attached and fastened to said floor and building by screws firmly imbedded in said floor, by means whereof said chairs, and each thereof, became a permanent incident and improvement of said opera house building; that it was the intention of Lanyon in so attaching said chairs to said floor in the manner above specified, thereby to make them permanent fixtures and improvements in said building; that in view of the distinctive character of said building such chairs constitute an indispensable part of said opera house, and without the same, said house would be valueless for the purposes contemplated in its construction; that said \$9,000 is now wholly due, but it is

wholly unpaid; that said trust deed remains in full force; that on February 19, 1887, Lanyon delivered to A. H. Andrews & Company six notes, \$200 each, due in two, four, six, eight, ten and twelve months after date, and to secure the same executed to said Andrews & Company a chattel mortgage upon said 796 opera chairs; that the last of said notes will fall due February 19, 1888, and that Lanyon is in default on five of said notes; that it is the intention of said defendant to foreclose said mortgage upon the maturity of said last note, and to detach and remove said chairs, the same being permanently attached to said building; that if such intention are carried out it will result in irreparable injury to orators and wholly destroy the utility of said opera house, and greatly impair and lessen their security. Orators attach copy of trust deed, "Exhibit A," and copy of notes, "Exhibit B."

To the end that defendants, A. H. Andrews & Company, J. B. Lanyon, T. O. Dargan and Jos. Allen, all of whom claim some interest in said building, may answer, without oath, and that A. H. Andrews & Company may be enjoined from carrying out its intentions and from detaching and removing or in any wise interfering with said building and chairs in violation of orators' rights.

Bill sworn to.

The answer of A. H. Andrews & Company, filed February 17, 1888, admits delivery of real estate mortgage by Lanyon to F. R. Chandler, April 20, 1885, to secure \$9,000. Admits erection of an opera house, so called, on same land during 1885. That opera house was furnished by Lanyon with 796 chairs. Denies that said chairs were peculiarly adapted for use in an opera house, but equally adapted for use in a church. Denies that chairs were intended to be permanently attached to the floor of said opera house as a permanent fixture. Admits that chairs were fastened to the floor with screws. Denies that chairs by such fastening became a permanent improvement of building. Expressly denies that it was the intention of Lanyon in so attaching chairs to floor to make them permanent fixtures. Denies that chairs constitute an indispensable part of said opera house, or the same would

be valueless without them for purposes contemplated. Admits that on February 19, 1887, Lanyon delivered to respondent six notes, \$200 each, and secured the same by chattel mortgage on said 796 chairs, duly acknowledged and recorded—copy of unpaid notes, "Exhibit A" and mortgage, "Exhibit B"—and that last note will mature February 21, 1888; only one has been paid, and it was the intention of respondent to foreclose said mortgage upon maturity of said notes, and remove said chairs from said building under powers in said mortgage in case the same were not paid. Denies that such removal would result in any injury to complainants. Avers that building and grounds are worth about \$10,000; that Lanyon is indebted to respondent on said notes and chattel mortgage about \$1,124; that said notes were given by Lanyon to respondent in renewal of certain other unpaid notes which were secured by chattel mortgage of like import upon said chairs, duly acknowledged and recorded and then about to mature; that said original notes were given by Lanyon to respondent in payment of purchase price of said 796 chairs; that said original notes and chattel mortgage, and said notes and mortgage of February 19, 1887, were given by Lanyon to respondent in pursuance of the original contract of purchase of said chairs by Lanyon from respondent, which contract was in writing, signed by Lanyon; a copy is "Exhibit C;" that said chairs were not constructed especially for said house, but are of patterns kept in stock by respondent in its business of manufacturer of furniture and bank, church and school fixtures and furnishings; that chairs were in all respects complete and ready for use before the same were placed in said house; that only attachment of chairs to building is by means of screws through the feet of said chairs sunk into the floor; that removal of chairs would in no wise injure building nor chairs, and can be accomplished by simply removing the screws from the feet of chairs; that it was distinctly understood and agreed between Lanyon and respondent at time of purchase of chairs that the same should not become a part of the building, but should remain personal property, at least until the purchase was fully paid; avers that Lanyon has paid on account

Andrews & Co. v. Chandler.

of purchase price of said chairs \$1,000, and that Lanyon, Dorgan and Allen have at no time questioned the right of respondent to exercise the powers conferred by said chattel mortgage; and Allen, the present owner of the building, has repeatedly promised to pay said five unpaid notes.

Jurat by A. H. Andrews, president.

"Exhibit A." Five notes, \$200 each, dated February 19, 1887, Lanyon to A. H. Andrews & Company, due four, six, eight, ten and twelve months.

"Exhibit B." "Chattel mortgage, dated February 19, 1887, Lanyon to A. H. Andrews & Company, on 796 chairs, to secure said six notes, \$200 each. Lanyon covenants that he is lawfully possessed of said goods and chattels; that the same are free from incumbrances; that he will keep the same insured and make loss payable to holder of notes; that in case of default second party may enter the premises and take possession and remove and sell. Acknowledged and recorded February 21, 1887.

"Exhibit C." "Contract, dated July 6, 1885, between A. H. Andrews & Company and J. B. Lanyon, witnesseth: That first party have sold to second party the bill of opera chairs on back thereof for price named therein, to be delivered, set up complete in opera house at Englewood. Second party to make accurate measurements of the space on which the chairs are to be placed; if on a curve, exact length of curve; if straight, exact length of line; and to furnish plan of seating; all information within ten days. Second party to pay \$2.75 each for No. 3 chairs and \$2.25 No. 35 chairs, as follows: In cash, \$200, after first performance, balance by notes due in six, nine and twelve months, secured by mortgage on the chairs, with interest at seven per cent. Chairs to be insured by J. B. Lanyon, loss, if any, to be paid to A. H. Andrews & Company. Settlement to be made within thirty days from the receipt of goods.

(Signed)

"J. B. LANYON,

"A. H. ANDREWS & Co."

A motion to dissolve the injunction was made by appellants, and on the hearing of said motion, the answer was read

and also the affidavit of one Weber, stating that he was the secretary of appellant, and drew up the contract for sale to Lanyon of the opera chairs; that the question of securing the purchase price of said chairs was talked over between Lanyon and affiant; that Lanyon agreed to give a chattel mortgage in the usual form to secure the balance of the price; that the chairs were sold and delivered to Lanyon upon the faith of said contract.

Appellees in opposition to the motion read the bill and an affidavit by Chandler that Chandler & Company had no notice of the notes and chattel mortgage until within two weeks since; that in making said loan affiant contemplated that he was making a loan upon an opera house to be completed with all the appointments and improvements of a modern opera house; that he would not have loaned said money had he known or anticipated that one of the chief and most valuable and necessary features of an opera house, to wit, opera chairs, was to be withheld from him as security for his loan.

The court overruled the motion to dissolve the injunction, and from said order the appeal is prosecuted to this court.

Mr. LYMAN M. PAINE, for appellant.

The case of *Sword v. Low*, 13 N. E. Rep. 826, shows clearly that Illinois is one of the States in which the rule has become established that chattels annexed to realty under an agreement that they shall continue to remain personalty will retain their chattel character against a mortgagee of the real estate.

In that case the court says: "To determine the irremovable character of a fixture, three tests are by the modern authorities applied, viz.: 1. Actual annexation to the realty or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated, and, 3. The intention of the parties making the annexation to make a permanent accession to the freehold." See, also, *Kelly v. Austin*, 46 Ill. 156.

In the case of *Crippen v. Morrison*, 13 Mich. 23, where a real estate mortgage was given with a verbal agreement that the mortgagor would erect a saw-mill on the premises, he

did erect the saw-mill, but he gave a chattel mortgage on the engine and machinery six months after the real estate mortgage, having bought the engine upon express agreement to secure the purchase price by chattel mortgage. The seller of the engine was held to have the better right in a contest with the real estate mortgagee, and the court said: "The property which was the subject of this litigation was only erected upon the premises upon the agreement that it should be subject to a chattel mortgage for its purchase price. By this the parties kept it separate from the realty and it never became part of it."

The complainants in this case must rest their case simply and alone upon the presumption that improvements made by the mortgagor on the mortgaged premises were made for the benefit of the inheritance. This presumption is not absolute, but may be rebutted by agreement between the mortgagor and the owner of chattels annexed. *Ewell on Fixtures*, 283. But conceding for the moment all that appellees claim respecting the permanent accession of these chairs to the freehold, still appellees can not complain of their removal "unless such severance would impair the mortgagee's security and render it of doubtful adequacy." Till they can show that without the chairs their security is of doubtful adequacy, they have "no remedy for such severance either by recaption of the articles severed, action at law for such severance, or for the articles severed, or by injunction to restrain the mortgagor from making the same." *Ewell on Fixtures*, 49.

Mr. HOWARD HARE, for appellees.

MORAN, P. J. The question presented for decision is whether, under the circumstances of this case, the opera chairs are to be considered fixtures, as between the real estate mortgagee and the holder of the chattel mortgage, who sold and delivered the chairs upon a contract that the deferred payments for them should be secured by a chattel mortgage upon them. Whether articles which are attached to a building become a part of the realty or remain movable fixtures, will depend, according to the weight of authority, upon the intention of the party affixing them, particularly where the articles

attached can be removed without injury to the articles themselves or to the freehold.

Here the intention of Lanyon, that the opera chairs should remain personal property, is very clearly evidenced by his agreement in the contract of purchase that he would give a chattel mortgage upon them to secure part of the purchase money, and that he would insure them, "loss, if any, payable to A. H. Andrews & Co."

We can not see that the rights of appellant are at all affected by the fact that the first chattel mortgage expired and that a new one was executed to secure the balance of the purchase money yet remaining unpaid. While the lien secured by the first chattel mortgage expired, the intention with which the chairs were put in the building continued and the new chattel mortgage created a new lien upon them, whereas the lien of the real estate mortgage did not extend to them, they continuing to be chattels. It is not deemed necessary to examine and discuss the various authorities with reference to the law of fixtures as applicable to the facts of this case. We regard, the case as controlled by *Sword v. Low*, recently decided by the Supreme Court, 11 Western Rep. 719, in which the cases on the subject are fully cited and considered. And see, also, *Campbell v. Roddy*, 12 Central Rep. 821.

It is not alleged in the bill that Lanyon is insolvent, or that the removal of the chairs would so reduce the value of the property as to make the security inadequate. The answer alleges that the property covered by the mortgage is of the value of \$40,000, and the loan secured is \$9,000. Under that state of facts it seems to be established that the mortgagee is not entitled to an injunction to restrain the removal of fixtures which are subject to the lien of the mortgage. *Ewell on Fixtures*, 49, and cases cited.

This condition of the record was proper to be considered on the motion to dissolve, and would, in our opinion, warrant the granting of the order of dissolution.

The order overruling the motion to dissolve the injunction will be reversed, and the case will be remanded to the Circuit Court, with directions to enter an order dissolving the preliminary injunction now existing in said cause.

Reversed and remanded.

ALEXANDER R. MACDONALD

v.

DANIEL M. LORD AND AMBROSE L. THOMAS.

Libel—Words Spoken of One in his Occupation—Province of Court and Jury—Advertising Agency—Privilege.

1. Words spoken of one in his office, trade, profession or business, which tend to impair his credit, or charge him with fraud or indirect dealings, or with incapacity, and that tend to injure him in his trade, profession or business, are actionable without proof of special damages.

2. A letter stating that the writers have been applied to by an advertising agent to insert in a certain paper the advertisement of the person addressed and have had to decline it, but will be glad to receive it "direct, or through any responsible agency," conveys the idea that the agency in question is not responsible.

[Opinion filed August 1, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

This is an action on the case brought by plaintiff in error against defendant in error, to recover damages for the publication of an alleged libel by defendants. A general demurrer to the declaration was sustained and judgment for costs entered against plaintiff, to reverse which he sued out this writ of error.

The declaration consists of numerous counts, but as the demurrer was sustained to the entire declaration, it is only necessary to state the substance of the first count, which alleged in effect, that the plaintiff carried on business as an advertising agent in Chicago, conducted the same with punctuality, keeping his engagements and paying his debts, and was held in good credit and esteem by his neighbors and by those with whom he had business dealings, and in and through said business acquired gains to support his family and to the increase of his fortune. That plaintiff had entered into a contract with

the David C. Cook Company, publishers of a newspaper called "Church and Home," for five hundred inches or more of space in the advertising columns of that paper at a certain price per inch, and had solicited and procured an advertisement from George S. Vibert & Company of Clintonville, Connecticut, at a price greater than he was to pay said publishing company, and before the committing of the grievances, plaintiff had not delivered to said defendants any order to insert any advertisement in the "Church and Home." That he was conducting a respectable advertising agency, and the defendants, maliciously contriving to injure his good name reputation and credit in said business, and to cause him to be regarded as a person of no credit and in insolvent circumstances, and to prejudice and injure him with said Vibert & Company and other advertising agents doing business at the place aforesaid, who had dealt, and were then dealing, with the plaintiff in the way of his business, and to induce Vibert & Company and others to leave off dealing with the plaintiff, on November 5, 1885, falsely and maliciously wrote and published a false, scandalous and malicious and defamatory libel, of and concerning plaintiff, and of and concerning his business circumstances and credit, in the form of a letter addressed to said Vibert & Company and others, containing malicious matter as follows: "Gentlemen (meaning the aforesaid George S. Vibert & Co.): We (meaning the defendants) are just in receipt of an order from A. R. MacDonald (meaning the plaintiff in this suit) to insert your (said George S. Vibert & Co.) advertisement in the 'Church and Home,' and of which we (meaning the defendants) own the entire advertising space. We (meaning the defendants) are obliged to decline it (meaning the order aforesaid) for certain reasons, but we would be glad to receive your (meaning the aforesaid George S. Vibert & Co.) order direct, or through any responsible agency." Thereby meaning to state that the business of the plaintiff as an advertising agent was not a responsible agency.

Then follows an allegation in the count, of special injury to the plaintiff in his trade and business, resulting in special damages, for which he claims, etc.

McDonald v. Lord & Thomas.

Mr. GEORGE C. BUELL, for plaintiff in error.

Messrs. BARKER & THORNTON, for defendants in error.

GARNETT, J. The publication charged against the defendants was concerning the plaintiff in his character as an advertising agent. The inducement alleges that he was engaged in that business at the time of the publication. The rule in such cases is stated in Townshend on Slander and Libel, Sec. 182, to be, that language which concerns a person in his employment, (if such person's employment is lawful, and may reasonably be expected to yield pecuniary reward,) will be actionable if it affects him in a manner that may, as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom reward which probably he might otherwise have obtained.

And in the case of Clifford v. Cochrane, 10 Ill. App. 570, the court gave the rule thus: "The general rule in relation to the speaking of words of one in a particular calling may be stated as follows: Any words spoken of such a person in his office, trade, profession or business, which tend to impair his credit, or charge him with fraud or indirect dealings, or with incapacity, and that tend to injure him in his trade, profession or business, are actionable without proof of special damages."

The letter sent by defendants to George S. Vibert & Company, carried with it a strong implication that plaintiff's agency was not responsible. Such a charge is always regarded as harmful to the business interests of a house, and as surely awakens distrust as a direct attack on its honesty. The injurious character of the communication might have been avoided had defendants informed Vibert & Company that they would be pleased to receive their order through any *other* responsible agency. But having stated that they declined the order through A. R. MacDonald, and then indicating their pleasure to receive the order through *any* responsible agency, an ordinary reader would scarcely fail to find in the letter, the reflection upon plaintiff's business character, which is alleged in the innuendo.

If the words employed are reasonably susceptible of two constructions, the one innocent and the other libelous, it is a question for the jury which is the proper construction. It is for the court to decide whether a publication is reasonably capable of the meaning ascribed to it in the innuendo, and for the jury to decide whether such meaning is truly ascribed. *Hays v. Mather*, 15 Ill. App. 30.

Taking the letter set forth in the declaration according to its plain and natural import, we think it reasonably susceptible of conveying the idea that plaintiff's agency was not responsible. The defendant's counsel have fallen into an error in supposing that the declaration shows the communication was privileged because defendants were the owners of the advertising space, and therefore had the right to address Vibert & Company in the manner charged. But the declaration states that plaintiff was the owner of the space; hence the question of privilege is not before us and we express no opinion thereon.

There was error in sustaining the demurrer. The judgment is therefore reversed and remanded.

Reversed and remanded.

LEOPOLD DIETZ

v.

K. G. SCHMIDT.

Landlord and Tenant—Guaranty—Assignment.

1. Where a lease contains a covenant on the part of the lessee not to assign without the lessor's assent, an assignment with such assent does not discharge the liability of the guarantor, although such assignment was without his knowledge.

2. In the case presented, it is *held*: That an agreement between the lessor and the guarantor that the question of the liability of the latter should abide the final judgment in a certain suit, contemplated a judgment rendered on the merits.

[Opinion filed August 1, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. M. SALOMON and J. A. SLEEPER, for appellant.

Messrs. WILLIAM VOCKE and HARVEY STORCK, for appellee.

GARNETT, J. The appellant brought this action against appellee on a guaranty of the payment of rent written on a lease for a term of five years, dated April 17, 1882.

The case was tried by the court without a jury; finding and judgment against the plaintiff, from which he appeals. The defendant interposed several defenses:

First. After the tenant, Fisher, had occupied the premises for about two years, he sold his stock and fixtures and assigned his lease to Henrietta Krause, she taking possession and paying the rent for some time; and, as appellee insists, this was done with the consent of appellant, and without the knowledge or consent of appellee.

Assignment of the lease by the tenant, with the consent of the landlord, does not discharge the guarantor's liability. The lease contained a covenant on the part of the lessee not to assign without the landlord's consent. That was for the benefit of the landlord and impliedly gave him the right to consent to an assignment. Such consent and assignment in no way enlarged or affected the liability of appellee. The ruling of this court in *Stein v. Jones*, 18 Ill. App. 543, closes discussion of the question in this court.

Second. After the assignment to Krause, certain installments of rent being unpaid, Dietz commenced two suits against Schmidt on his guaranty before a justice of the peace. Thereupon an agreement was made between Dietz and Schmidt, dated January 3, 1885, providing that the two suits should be dismissed and costs therein paid by Schmidt; that Dietz should, within thirty days, bring suit in the Superior Court to recover the amount claimed to be due on the guaranty, in which

Schmidt should appear and plead within ten days after notice of its commencement; that any final judgment in that case in Schmidt's favor, not appealed from, should discharge him from liability as guarantor; that until said suit was determined one Bamberger was to rent the premises as agent, and credit to Schmidt the amount received, less commissions, and that no such renting should be construed to discharge the liability of Schmidt.

It is alleged that suit was commenced by Dietz as agreed, but that he took a non-suit therein, and judgment for costs was rendered against him, from which no appeal was taken. That is claimed by Schmidt to be a final judgment within the terms of the agreement. We can not concur in that view. It is unreasonable to suppose that either party contemplated any judgment as a bar to appellant's cause of action except such as should be rendered on the merits of the case. But a conclusive answer to appellee's position is, that the record fails to show a final judgment in the suit commenced by Dietz in pursuance of the agreement.

The record offered in evidence shows a judgment for costs against the plaintiff in the Superior Court, in a cause wherein Leopold Dietz was plaintiff and K. G. Schmidt was defendant, but there is no evidence showing what was the issue in that suit, what was sought to be recovered, nor when the suit was commenced.

Third. After the making of the agreement of January 3, 1885, Bamberger leased the premises to one Koblitz. Appellee insists upon that leasing as a defense. It was expressly authorized by the terms of the contract. We are at a loss to understand how appellee can interpose this leasing as a discharge of his liability.

The court below erred in its finding and judgment for appellee. The judgment will therefore be reversed and remanded.

Reversed and remanded.

EDGAR D. SWIFT, IMPLEADED WITH JULIA A. SLAFTER
ET AL.

V.

HUGH MARTIN ET AL.

Mechanic's Lien—Statutory Bond—Discharge of Lien—Practice—Reversal in Part.

The Supreme Court, having remanded a case involving mechanic's liens, improperly decreed by the court below, for this court to consider other errors assigned, it is *held*: That the decree should stand affirmed except as to so much of each as declares a lien and renders judgment *in personam* against the defendant.

[Opinion filed August 1, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. S. E. DALE and F. W. BECKER, for appellant.

MR. JOSEPH B. LEAKE, for appellees.

MORAN, P. J. The above entitled cases were, by stipulation, heard and determined together in the court below, and while separate decrees were entered, one certificate of evidence entitled in all the cases was signed, and by agreement they were all brought to this court on one record. They were heard in this court at the October term, 1886, and a judgment was rendered reversing the decrees in the court below. On appeal to the Supreme Court the conclusions reached by this court were in part affirmed and in part reversed, and the cases were remanded to this court for further proceedings. We refer to the opinion of this court, 20 Ill. App. 515, and to the opinion of the Supreme Court reported in 120 Ill. 488, for particulars of the case and a statement of the question involved, which it is deemed unnecessary to repeat here.

This court held that there was error in decreeing a lien and that the suits should have been dismissed by the court below upon the filing of the bond, in accordance with the mechanic's lien act, and reversed the decrees. The Supreme Court agreed with this court that there was error in decreeing liens, but said of the order of the Appellate Court, that "It did not follow, from the error in decreeing a lien, that the decrees must be reversed entirely, but only that they should be reversed in part, in so far as they decreed liens.

"The other errors assigned, among which is one as to the amounts found due, were never in fact considered or passed upon by that court, and yet it, in effect, sustains that assignment of error by reversing the decrees wholly. Had the cases gone back to the trial court there would have to be a re-trial there of the issues as to the amount due, when there had been no determination by the court of review that the former finding on those issues was erroneous. And as it now stands there is no finding as to the amounts due, and in a suit upon the bond there would have to be the same re-trial of those issues.

"In order to a reversal of the decree entirely we think the other errors assigned, or at least the one as to the amount due, should have been considered and passed upon by the Appellate Court."

In obedience to the direction of the Supreme Court we have now considered all the errors assigned upon the record against the decrees entered by the Superior Court, and we are of opinion that there are no errors in said decrees except in decreeing the liens for the amounts found to be due from the owners to appellant, and in giving judgments *in personam* against appellant for the amounts found due from him to appellees. We are of opinion that the evidence supports the finding of the court in respect to the amounts found to be due from appellant to appellees, and that said decrees should stand as to the said amounts so found to be due in each case.

The decrees in said cases will therefore be reversed as to so much thereof respectively as declares a lien for any amount, and as to so much thereof as gives a judgment *in personam*

Start v. Moran.

against appellant, and will stand affirmed as to so much thereof respectively as finds and determines the amount due from said appellant to appellees in each of said cases. And such other or further proceedings may be had in said cases in the Superior Court as are not inconsistent with this opinion.

Reversed in part and affirmed in part.

STEPHEN S. START

V.

PATRICK MORAN ET AL.

Practice—Variance—Objection First Raised in This Court—Evidence—Note—Guaranty.

1. A general objection of variance between the declaration and proof is insufficient. That it may be available by exception, in what it consists must be made to appear.

2. An objection can not be first raised in this court.

[Opinion filed August 1, 1888.]

ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Action of assumpsit on guaranty brought by defendants in error against plaintiff in error. The note and guaranty thereon were as follows :

“\$650.

CHICAGO, February 26, 1880.

“Six months after date I promise to pay to the order of D. H. Tolman & Co., six hundred and fifty dollars, payable at their office, value received, with interest at 8 per cent. per annum.

G. E. BOYLES.”

Indorsed :

“S. S. START.

“Pay to P. MORAN & Co.

“D. H. TOLMAN & Co., without recourse on D. H. Tolman & Co.”

“Payment guaranteed by me, August 28, 1880.

S. S. START.”

27	119
41	251
27	119
43	47
27	119
77	480

27	119
102	807
27	119
107	896

The declaration alleged the making of the note on, to wit, February 26, 1880, and that D. H. Tolman & Company afterward, to wit, on the day and year aforesaid, and before the maturity of the note, indorsed and delivered the same to P. Moran & Company, and that on the same day, and before delivery of the note to the plaintiffs, in consideration that plaintiffs would accept and receive said note of said D. H. Tolman & Company, and for a valuable consideration to him in hand paid by the plaintiffs, the defendant, by his indorsement thereon, guaranteed the payment of said note, and promised the plaintiffs to pay the same if Boyles should not; that plaintiffs, relying on the undertaking of the defendant, received said note; that Boyles refused to pay the note, and defendant having notice thereof, became liable, etc.

On the trial, the evidence showed that the first indorsement, "S. S. Start," was on the note when it was delivered to the plaintiffs, but did not show whether it was written there before the note was delivered to the payees or after. It also appeared that the second indorsement by Start was made after the delivery of the note to plaintiffs. The note and indorsement were offered in evidence by plaintiffs, and objected to by defendant for the reason that the same was incompetent and irrelevant, and variant from the cause of action set forth in the declaration, and that plaintiffs had failed to show any consideration for the supposed guaranty. The objection was overruled, and defendant excepted. Verdict for plaintiffs for \$906.07. Motion for new trial by defendant. Motion overruled and judgment on verdict. Defendant sues out this writ of error to reverse the judgment.

Messrs. WHITEHEAD & PICKARD, for plaintiff in error.

Messrs. CLIFFORD & SMITH, for defendants in error.

GARNETT, J. The plaintiff in error objects to the judgment below, on the ground that neither of the considerations set forth in the declaration was proven as alleged. Whether that point is sound on the merits may be doubted, but the record

Martin v. Stubbings.

is in such condition that the question can not be raised in this court. The objection to the admission in evidence of the note and indorsement was that they were incompetent and irrelevant; that they were variant from the cause of action described in the declaration, and that no consideration had been shown for the supposed guaranty. There can be no pretense that the evidence was incompetent, nor does the plaintiff in error now make any such contention. The objection on the ground of variance was general, and failed to point out in what the variance consisted. That has been held insufficient. *St. Clair County Ben. Soc. v. Fietsam, Adm'r*, 97 Ill. 474.

If the variance had been specified the declaration could have been amended or further proof introduced to supply any deficiency. In this respect the case is parallel to *Watson's Executors v. McLaren*, 19 Wend. 557, where the court, in reply to a similar objection, said: "The objection was general that the guaranty and note varied from each count. The objection stopped there. To be made available by exception the particular discordances should have been pointed out, as they are now, for they were open to be obviated."

The proof did show a consideration. The law presumes a consideration from the note and guaranty. This is admitted by plaintiff in error, but he insists that the consideration thus presumed is not the consideration alleged in the declaration. The objection alleged on the trial was, that the proof did not show any consideration, which was not true. It would be unfair to allow this point any weight when the attention of the plaintiff below was not directed to it in time to meet it. The judgment of the court below will be affirmed.

Judgment affirmed.

CORNELIA MARTIN

v.

WILSON H. STUBBINGS, IMPLEADED, ETC.

Assignment of Insurance Policy and Benefit Certificate—Public Policy—Consideration—Parol Evidence—Bill of Interpleader.

1. Parol evidence is admissible to prove the consideration for a note and a written assignment of an insurance policy and benefit certificate as security therefor.

2. The waiver of a legal right is a sufficient consideration for a promise.

3. In the case presented, it is *held*: That the sum found due upon an accounting between the husband and his co-partner was at least a sufficient equitable consideration for the note and assignment of the insurance policy and benefit certificate, which were executed by the husband and wife; that the waiver by said co-partner of his legal right to terminate the contract of partnership was an additional consideration; and that such assignment was not against public policy.

[Opinion filed August 1, 1888.]

ERROR to the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

This is error to the Superior Court upon a decree in favor of Stubbings, the defendant in error, and against the plaintiff in error, Cornelia Martin, in proceedings by bill of interpleader, brought by the Knights Templar and Mason's Life Indemnity Company against said parties, for the purpose of having them interpleaded, so that the court might determine which of them was entitled to the money due, and to what extent, upon a policy of life insurance issued in June, 1883, by said company upon the life of Neal K. Martin, the husband of said Cornelia, in the sum of \$5,000, payable to the widow, children and heirs of said Martin, unless otherwise ordered during his lifetime or in his will, and containing the express provision that he might change the beneficiary thereunder at his pleasure without notice to or consent of the beneficiary designated. The said Cornelia claimed all of said money, as the widow of said Neal K. Martin, he having died July 27, 1886, and said Stubbings claimed a lien upon it, to the extent of the sum of \$3,411.66 and interest, on the alleged ground that April 16, 1886, the said Neal K. Martin being indebted to him in said sum, made his promissory judgment note for said sum payable to him, said Stubbings, one day after that date; that said Cornelia then signed said note as surety and joined with her said husband in assigning and pledging to said Stub-

Martin v. Stubbings.

blings as security for the payment of said note, the policy or certificate of insurance aforesaid, and also a certain benefit certificate issued to said Neal K. Martin by the Supreme Council of the Royal League, whereby the latter promised to pay said Cornelia, as the wife of said Neal K. Martin, out of its widows and orphans benefit fund, a sum not exceeding \$4,000, in accordance with its laws, etc., both of which policies or certificates were delivered into the possession of said Stubbings, at the time of making said note, as a pledge or security for its payment.

Cornelia Martin, in order to defeat Stubbings' right under said assignment and pledge, relied upon two grounds only: First, that there was no good or sufficient consideration for the said note or the assignment. Second, that the policies or certificates, from the nature of the corporation issuing them, were not assignable, because it was against public policy and the implied prohibition of the statute, under which the associations issuing them were created, that they should be so. The material facts, as shown by the record and preponderance of the evidence, out of which the transaction of making said note and transfer of the policy and certificate to Stubbings arose are as follows: April 16, 1883, Neal K. Martin and Stubbings entered into articles of co-partnership for the purpose of carrying on the business of painting in all its branches, and the sale of paints, oils, varnishes, brushes, etc., in the city of Chicago. The articles provided that the firm name should be W. H. Stubbings & Company; that said partnership should continue for the term of five years, but might at any time be dissolved upon either party giving to the other three months notice in writing of his desire to dissolve the same; that Stubbings should furnish the cash capital required to carry on said business, provide and keep on hand and replenish from time to time a stock of paints, oils, varnish, brushes, ladders, tools, etc., required to carry on said business; that said Martin should devote all his time and energy to said business, and have the entire control and management of the same; that the profits of said business, after paying for the stock furnished and all expenses of said business, should be equally

divided between them. It appears that the parties went into said business as partners, under said articles, and carried on the same thereunder until April 16, 1886; that some time prior to that date, Stubbings discovered that Martin had been drawing out for his own individual use more than his share of the profits, and upon careful and repeated investigation into the affairs of the firm, it was ascertained to the entire satisfaction of said Martin, that down to January 1, 1886, that being the time to which the accounting extended, Martin had overdrawn from said profits the sum of \$3,411.66, which belonged to Stubbings, and a settlement was had between them upon that basis; that is, that on the 1st day of January Martin owed Stubbings that amount. It appears that Stubbings, immediately upon discovering such overdraft, decided to dissolve said partnership, and gave Martin written notice to that effect; that Martin at that time was in bad health and earnestly appealed to Stubbings not to cast him off, as he was without means; that finally Martin proposed to Stubbings that if he would not sever, but renew their partnership relations for another period of time to enable him to pay up said overdraft, he would give his note to Stubbings for said amount, signed by his wife, and secure the same by turning over to Stubbings his life insurance, in which proposition the plaintiff in error concurred and joined; that Stubbings after a while acceded to that proposition, and in pursuance thereof all the parties met together April 16, 1886, when, everything being understood and details agreed upon, said Martin executed said note as principal, and his wife as surety, to secure which both joined in a written assignment and pledge of the said policy of life insurance and said benefit certificate, and the wife, having brought them there, they were then and there delivered into Stubbings' possession; that thereupon Martin and Stubbings executed new articles of co-partnership bearing that date, whereby the former ones were specifically canceled and annulled, and provided, in substance: 1. That said parties thereby formed a partnership for the purpose of carrying on the business of painting and papering in all its branches, and buying and selling painted

Martin v. Stubbings.

goods and materials of all kinds of paints, papers, oils, varnishes, brushes, ladders, etc.

2. That the business should be carried on under the firm name and style of W. H. Stubbings & Company.

3. That said partnership should continue for the term of two years, but might be dissolved at any time by either party giving to the other three months notice in writing of his desire to dissolve the same.

4. That Stubbings should allow the plant and stock on hand belonging to him which had been used in the business heretofore carried on by said parties, and which is now located at 541 West Madison street, in the city of Chicago, to continue to be used in the business of said parties, and, when necessary, he should also advance the cash capital required to carry on said business, and replenish said stock from time to time as may be necessary to carry on said business, the firm allowing interest on the money so advanced.

5. That said Martin should devote all his time and energy to said business, so far as his health will permit, and shall have the control and management of the same.

6. That during the continuance of said partnership business said Stubbings shall spend such time in said business as he conveniently can.

7. That said Martin shall keep, or cause to be kept, just and true books of account of said business, which shall at all times be open to the inspection of Stubbings.

8. That said parties shall equally share all profits and losses of said business; but no profits shall be divided until all the expenses of said business have been paid and said Stubbings shall have been reimbursed for the value of the plant and stock contributed by him as aforesaid, and all capital which he may advance, as hereinbefore provided.

9. "It is hereby mutually agreed that neither party hereto shall draw from the said business a sum to exceed one hundred and fifty dollars during any one month during the continuance of this partnership, unless the sum shall be mutually agreed upon in writing."

It appears that the partnership was launched and busi-

VOL. 27.]

Martin v. Stubbings.

ness carried on under said articles until July 27, 1886, when said Martin died. At the hearing upon pleadings and proofs, a decree passed in favor of Stubbings, in which the associations issuing said policy and benefit certificate respectively acquiesced, and Cornelia Martin alone brings error to this court.

Messrs. MILLARD R. POWERS and ROBERT S. ILES, for plaintiff in error.

We maintain, in the case at bar, that to permit the assignment of such certificates as the ones in issue, by the assured, to pay his debts, is contrary to public policy, because it defeats the provisions of the contract between the company and the assured and deprives the widows and orphans of the fund which was especially set apart for their benefit, thus leaving them liable to become a charge upon the public, which is contrary to the spirit of modern society, hence to public policy; for the spirit of our laws (public policy as we term it), is to protect the citizen and his family, in their person and property, to such an extent as to enable them to be self-supporting and not to become paupers. This is also the manifest object of the creation of the fund in question, and the organization of these mutual benevolent associations.

That this is the policy of our law is shown by the enactment of exemption laws, and the decisions thereunder, wherein it is held that a man can not sign away or waive his exemptions, as they are intended for the benefit of his family. *Phelps v. Phelps*, 72 Ill. 545; *Curtis v. O'Brien*, 20 Ia. 376; *Recht v. Kelly*, 82 Ill. 147.

Messrs. HOYNE & FOLLANSBEE, for defendant in error.

The execution of the new articles of co-partnership by which the scope of the business theretofore carried on between Stubbings and Martin was enlarged, and by which Martin was to devote only such time to the same as his health would permit, and by which Stubbings was limited as to the amount of money which he could withdraw from the firm monthly, and by which he waived his right to terminate all business relations

Martin v. Stubbings.

existing between them, was a sufficient consideration for the execution of said note by Mr. and Mrs. Martin, and a sufficient consideration for the deposit of said collaterals by them. 1. Parsons on Contracts, 431; Doyle et al. v. Knapp, 3 Scam. 334; Buchanan v. International Bank, 78 Ill. 500, 505; Burch v. Hubbard, 48 Ill. 164, 171; Union Trust Co. v. Rigdon, 93 Ill. 458; Joliet Iron Co. v. Scioto Fire Brick Co., 83 Ill. 548; Benton v. Holliday, 44 Ark. 53; Miller et al. v. Hawker, 66 Ill. 185.

Parol evidence is admissible to show what the consideration in fact was for the execution of the judgment collateral note and the deposit of the collaterals. Grier v. Puterbaugh, 108 Ill. 602; Kidder v. Vandersloot, 114 Ill. 133; Huebsch v. Scheel et al., 81 Ill. 281; Wolf v. Fletmeyer, 83 Ill. 418; Primm v. Legg, 67 Ill. 500; Booth et al. v. Hynes et al., 54 Ill. 363.

It is no longer an open question in this State that life insurance policies or benefit certificates such as those in controversy are the subject of pledge or assignment, and that no principle of public policy is contravened in permitting the same to be done. This is also true in other States where not prohibited by statute or the contract of insurance itself. Norwood v. Guerdon, 60 Ill. 253; Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 388, 401; Highland v. Highland, 109 Ill. 366; Johnson v. Van Epps, 110 Ill. 551; Benefit Association v. Blue, 120 Ill. 121; Norris v. Mass. Ins. Co., 131 Mass. 294; Troy v. Sargent, 132 Mass. 408; Mutual Life Ins. Co. v. Allen, 138 Mass. 24; Briggs, Trustee, v. Earl, 139 Mass. 473; Newcomb v. Mut. Life Ins. Co., 9 Ins. Law Jour. 124; Emerick v. Coakley et al., 35 Md. 188; Supreme Lodge Knights of Honor v. Naim & Richardson, 22 Cent. Law Jour. 274; Mut. Aid Ass'n v. Gosner, 1 West. Rep. (Ohio) 4; Kentucky Masonic Mut. Life Ins. Co., etc., v. Miller, Adm'r, 13 Bush (Ky.), 489; Baker, Trustee, v. Young, 47 Mo. 453; Archibald v. The Mut. Life Ins. Co., 38 Wis. 542.

Even if the policy could not be pledged to Stubbings, that objection could be raised only by the companies, and not by Mrs. Martin. Johnson et al. v. Van Epps, 110 Ill. 551.

At the time Martin pledged said benefit certificates with Stubbings as collateral security for his indebtedness to him, Mrs. Martin had no interest in them; all she had was a mere expectancy, which, had he retained his interest in the policies, would have ripened into a vested right upon his death. As it was, he disposed of a part of his rights thereunder for a valuable consideration prior to his death, and if not done in conformity to the rules of the associations, they alone can complain. *Swift v. R. P. and F. C. Ben. Ass'n*, 96 Ill. 309; *Maloney v. O'Sullivan*, 16 Legal News, 181, 182; *Norwood et al. v. Guerdon*, 60 Ill. 253; *Exp. Aid Soc. v. Lewis*, 9 Mo. App. 412, 415.

McALLISTER, J. The position is broadly taken by counsel for plaintiff in error, that there was no legally sufficient consideration to support either the promissory note or assignment, as security therefor, of the policy of life insurance and benefit certificate in question, either as respected Neal K. Martin in his lifetime or as respects the plaintiff in error, his widow, and that, at all events, the court erred in admitting parol evidence tending to prove such consideration. If the instrument creating said note and assignment had recited a particular consideration, and that had been insufficient, then it would have been incompetent to prove another and different consideration by parol. *Schemerhorn v. Vanderheyden*, 1 Johns. 139; *Arms v. Ashley*, 4 Pick. 73. But no such particular consideration was expressed, and by the well settled rule of law, parol evidence was admissible to prove a consideration either directly or circumstantially. *Tingley v. Cutter*, 7 Conn. 291; *Cummings v. Bennett*, 26 Maine, 397; *Patchin v. Swift*, 21 Vt. 292; *Thompson v. Blanchard*, 3 N. Y. 335; *Primm v. Legg*, 67 Ill. 500; *Wolf v. Fletmeyer*, 83 Ill. 418; *Huebsch v. Scheel*, 81 Ill. 281; *Grier v. Puterbaugh*, 108 Ill. 602; *Kidder v. Vandersloot*, 114 Ill. 133.

The parol evidence being competent, the next question is, did it show a legally sufficient consideration for said promissory note and assignment as respects both parties making the same? Upon the facts shown by the record and a preponderance of all the evidence, we think it did.

Martin v. Stubbings.

The note was given to Stubbings for and on account of a sum found due and a balance struck upon an accounting, free from fraud or mistake, between the latter and said Neal K. Martin, as respected all their partnership affairs, down to January 1, 1886. It was not an accounting that was to be preliminary to a final settlement, but was, in fact, and so regarded by the parties, a final settlement down to that period of time. As between said Martin and Stubbings, that indebtedness from Martin constituted, as some authorities hold, a sufficient legal consideration for the note. Pars. on Part. p. 278; 2 Lindley on Part. 1027; Van Ness v. Forrest, 8 Cranch, 30; Sturges v. Swift, 32 Miss. 237. At all events it constituted a good equitable consideration, and this was a suit in equity. But there was an additional consideration. By the first articles of co-partnership Stubbings had the legal right, upon written notice to Martin, to sever their partnership relations, had decided to do so, and given the notice accordingly. But at the request of said Neal K. Martin, in which his wife united, and their proposition to give said promissory note and make said assignment as security therefor, if Stubbings would not sever said partnership relations, but continue the same, Stubbings consented to waive said right and to enter into new articles of co-partnership, which was done as set out in the statement of the case April 16, 1886, and the said note and assignment executed at the same time. The waiver of any legal right, at the request of another, has always been deemed a sufficient consideration for a promise. *Miller v. Hawker*, 66 Ill. 185.

Aside from that, it appears upon the face of said new articles of co-partnership, that pecuniary benefits would flow therefrom and the business to be carried on thereunder, from Stubbings to Martin, while the former subjected himself to the burden of furnishing the plant, all tools, materials and cash capital necessary to carry it on. Martin was to contribute nothing but his personal services, so far as his poor health would permit, was authorized to draw out one hundred and fifty dollars per month for his expenses, and entitled to one half the net profits.

There being a valuable consideration for the equitable assign-

ment of the policy of life insurance and benefit certificate, in which act Martin and his wife united and as to which there is no pretense of fraud or unfairness, we feel disinclined to enter into a discussion of the objections taken by counsel for plaintiff in error that such assignment was against public policy and impliedly prohibited by the statute under which the associations respectively were created, from which said policy and certificate emanated, because we consider that the decisions of our Supreme Court cover the entire ground against the plaintiff's contention. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Norwood v. Guerdon*, 60 Ill. 253; *Highland v. Highland*, 109 Ill. 366; *Johnson v. Van Epps*, 110 Ill. 551; *Benefit Association v. Blue*, 120 Ill. 121. The decree below should be affirmed.

Decree affirmed.

GARNETT, J., took no part in the decision of this case.

NOTE—The case of Cornelia Martin, impleaded with the Supreme Council of the Royal League v. Wilson H. Stubbings, being the same as the above case, is decided in the same way.

PATRICK J. DOYLE ET AL.

V.

JULIA MUNSTER ET AL.

Mechanic's Lien—Failure to Complete Contract—Sub-contractor's Lien—Petition—Notice—Sec. 45, Statute.

Where an original contractor has failed to complete his contract and a sub-contractor claims a lien under Sec. 45 of the statute, the petitioner is not required to set out the original contract, nor allege that there is anything due the original contractor.

[Opinion filed December 18, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

27	130
46	533
27	130
62	659
27	130
67	522

Plaintiffs in error filed their petition for a mechanic's lien substantially as follows: Petitioners, Patrick J. Doyle and R. J. Goodwillie, are partners, doing business under the firm name of P. J. Doyle & Co., and dealers in lumber and other building material in the city of Chicago.

That Julia Munster and Morris Munster are owners of, or have some interest in, and are in possession of, lot 8, in Harriet Farlen's subdivision of lots 13, 14 and 15 of Brown's subdivision of the N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 34, T. 39 N., R. 14, E. of 3d P. M., in Chicago, in said county, upon which is building number 3754 Wabash avenue.

That some time in August, 1886, said Julia and Morris Munster made a contract with one Walter Dick, whereby said Dick agreed to supply labor and materials for, and do the carpenter work, the painting and glazing of a building on said lot of ground, being the building aforesaid, to be finished within, as petitioners believe, a time limited and provided for in said contract, which time, petitioners believe, does not extend beyond three years from the making of the contract, nor beyond three years from the time of the commencement of work upon said building, and whereby said Morris and Julia Munster, in consideration thereof, agree to pay to the said Walter Dick within a certain time, as petitioners believe, not more than one year after the time stipulated for the completion of said work upon said building.

But petitioners are unable to set out the terms and conditions of said contract more in detail, and are unable to state whether said contract was in writing or otherwise, for the reason that said Julia and Morris Munster and also said Walter Dick, have refused the demand of your petitioners to have said writing exhibited to them and to be informed of the terms and conditions of said contract.

That after the making of the aforesaid contract, and in pursuance of the purposes thereof, on or about September 1, 1886, the said Walter Dick made a contract with petitioners to furnish certain articles of building materials to be used in the erection of said building, which said articles, together with the respective prices agreed upon for the same, are fully

set forth and attached hereto marked "Exhibit A." That the time for the delivery of said material was not definitely fixed, but it was understood that the same should be delivered at such times during the construction of said building as the said Walter Dick might need and call therefor; that the time of payment therefor was not fixed, but it was understood that said material should be paid for on delivery.

That pursuant to said last mentioned contract, petitioners commenced delivering said material, and up to October 5, 1886, had delivered to said Walter Dick the several amounts at the respective prices set opposite them, shown and fully set forth and attached hereto marked "Exhibit B."

That all of said material so sold and delivered to said Walter Dick was actually used in and about the construction of the aforesaid building, located on the aforesaid lot of ground.

That the prices annexed respectively to the several items in said "Exhibit B," were the prices agreed to be paid, and were reasonable market prices for the same; that petitioners have received nothing to apply on account of the same, and that there is now due to the petitioners the sum of \$196.46, together with interest thereon from time of delivery, which said sum the said Walter Dick and said Julia and Morris Munster, though the same has been demanded of them by petitioners, have refused or neglected to pay.

That on October 13, 1886, petitioners served upon the said Julia and Morris Munster a written notice as in such case provided, whereby they were notified that petitioners had been employed by said Walter Dick to furnish material for the said building, and that petitioners should hold said building and said lot of ground liable for the amount due or to become due thereon, a copy of which said notice is hereto attached marked "Exhibit C;" and that at the time of the service of said notice, as petitioners believe, a large sum of money, to wit, the sum of \$1,275, provided in said original contract to be paid by the said Munsters to said Dick on account of the erection of said building, remained to be paid.

That after the said material was furnished and used in said building, but before the building was fully completed, on or

about the 9th day of October, 1886, said Walter Dick abandoned work on the same, and surrendered it to said Julia and Morris Munster, and that the said unfinished building at the time of its abandonment and surrender was reasonably worth a large sum over and above the aggregate of the amounts already paid thereon, and of any damages that may have been sustained by reason of the non-fulfillment of the said original contract for the erection of said building, to wit, a sum greater than the amount due to petitioners as aforesaid.

That no other person, as petitioners believe, has any claim against the said building and premises for material furnished or labor performed.

In addition to the usual prayer for relief, petitioners pray that said Julia and Morris Munster may be required in their answer to fully set forth, first, their interest in said described lot; second, the terms and conditions of said original contract, and, if same was in writing, to attach a copy thereof thereto, and how much, if anything, had been paid to the said Walter Dick under the terms of said contract, at the time the aforesaid notice was served; third, the value of the work already done on said building, and the probable cost of completing the same; and fourth, the amount of damages, if any, sustained by them on account of the non-fulfillment of the said original contract. That the said Walter Dick may be required to answer in detail: First, the terms and provisions of said original contract; and second, the several amounts, if any, paid thereon prior to the 13th day of October, 1886.

A general demurrer was interposed to said petition by the defendants in error, Julia and Morris Munster, which was sustained by the court and plaintiffs in error electing to stand by their bill, a judgment was entered dismissing the petition at their cost.

To review this judgment the case is brought to this court.

Messrs. YOUNG & MAKEEL, for appellants.

It is enough for the court to know that there is a proper case presented under the law to call for its action. Further than that, the court needs no details, and will require none

unless when justice demands them for the information of the opposite party. In this case nothing would be subserved by presenting or undertaking to present to the opposite party information which it is already possessed of. There is certainly no reason, but the contrary, in holding that we must furnish to the opposing party information which we are not possessed of and which they are possessed of and refuse to disclose.

By demurring to our petition or bill they admit that the time for performance and payment was set within the limit prescribed for it by law; they admit that they know, and that we do not know, just how far within that limit it was set; they admit that we have requested information of that particular from them and that they have refused to give it; all this they admit by their demurrer because all this is set out in our petition or bill. Then, if these particulars are essential to the case, are we not entitled under our petition or bill to have it from them? It is one of the things for which we ask the interposition and aid of the court; namely, that the court should exercise its authority to compel them to set out and disclose these very particulars. The court has the power. It is given in mechanic's lien cases, "the same power and jurisdiction over the parties and subject," and the rules of practice and proceedings in such cases is made "the same as in other cases in chancery." Rev. Statutes, chapter entitled "Liens," Sec. 9; *Sutherland v. Ryerson*, 24 Ill. 521; *Lomax v. Dore*, 45 Ill. 381.

The general chancery code applies. *Clarke v. Boyle*, 51 Ill. 105.

"Suits to enforce mechanic's liens are substantially chancery proceedings, and are governed by the rules of chancery practice." *McGraw v. Bayard*, 96 Ill. 153.

Messrs. S. G. ABBOTT and WILLIAM H. KING, for defendants in error.

MORAN, J. We think the petition sufficient to entitle petitioners to relief, and that the court erred in sustaining the demurrer.

It was not necessary that appellants should set out the terms of the original contract between the Munsters and Dick, or show by allegations that it was such a contract in its terms as would authorize a lien when sought by the original contractor against the owner. A sub-contractor is given a lien if, in pursuance of the purposes of the contract between the owner and the original contractor, he furnishes labor or material in building any house. Sec. 29, Chap. 82, R. S.

The petition states that a contract was made between the Munsters and Dick, whereby Dick agreed to supply labor and material for, and do the carpenter work and painting and glazing on the building to be erected on Munster's lot; that after the making of said contract, Dick made a contract with petitioners to furnish certain lumber to be used in the erection of said building, to be delivered at such times during the construction of the building as said Dick should direct, and to be paid for on delivery; and that, pursuant to said contract, petitioners delivered said material to the amount of \$196.46, and that all said material so delivered was actually used in the construction of said building located on said lot.

The failure of Dick to pay for the said material is alleged, and the service of the proper notice on the Munsters, and it is stated that at the time said notice was served the sum of \$1,275, provided in the original contract to be paid by said Munster to said Dick on account of the erection of said building, remained to be paid. When we first considered this case we were inclined to hold that the petition should allege that something was due from the owner to the original contractor at the time of the notice, or that the owner should have become indebted to him thereafter upon the contract. Consideration of the different sections of the lien act, however, leads us to a different conclusion.

The object of the petition is to assert a claim under section 45 of that act, and the allegation is that after the material was furnished by petitioners, and had been used in said building, but before the same was completed, Dick abandoned work on the same and surrendered to the Munsters, and that the said unfinished building was, at the time of its abandonment,

reasonably worth a large sum over and above the aggregate of the amounts paid thereon, and of any damages sustained by reason of the non-fulfillment of the original contract for the erection of said building, which sum was greater than the amount petitioners claimed.

It is manifest that a petitioner seeking a lien and being obliged to work it out under the 45th section, could not allege that there was anything due to the original contractor. It could not be said that anything was due him under the contract, when it appears that he has failed to perform the contract, and abandoned the work.

The case is not to proceed under that section on the theory that there was anything due to him. The owner is liable for so much as the work and material should be shown to be reasonably worth according to the original contract price, first deducting what shall have been rightfully paid under the contract, and such damage as the owner has sustained by the failure to complete the work. *Mehrle v. Dunne et al.*, 75 Ill. 239.

The owner may of course be compelled to produce at the hearing the original contract, and disclose fully his payments and transactions under it. To require the petitioners to state those matters in the petition, would be in effect to deny any relief under the 45th section, for the law furnishes a subcontractor no means of obtaining such information before filing his petition.

The petition states a cause of action and requires an answer, and for sustaining the demurrer thereto the decree must be reversed, and the case remanded to the Superior Court.

Reversed and remanded.

GARNETT, J., took no part in the decision of this case.

THE STAR AND CRESCENT MILLING CO.

V.

THOMAS.

Personal Injuries—Elevator—Conflict of Evidence—Instructions—Degree of Accuracy Required.

1. Where the evidence is conflicting and there is no clear preponderance, unless each instruction on behalf of the successful party was accurate and free from all error calculated to mislead the jury, the judgment must be reversed and the cause remanded.

2. In an action by an employe of the defendant corporation to recover damages for a personal injury resulting from the fall of a freight elevator, this court holds that an instruction, which purports to direct the jury as to all the elements necessary to a recovery by the plaintiff, improperly assumed material facts in controversy and ignored essential issues of the case.

[Opinion filed August 1, 1888.]

APPEAL from the Superior Court of Cook County; the
HON. JOHN P. ALTGELD, Judge, presiding.

This was an action by appellee, Thomas, against the milling company, appellant, to recover for a personal injury to the former, sustained October 4, 1884, while employed as shipping clerk at appellant's mill, and being precipitated from the second to the basement floor of said mill while in the act of descending from an upper floor thereof by means of an elevator which ran away with him, by reason, as it is alleged; of the machinery and appliances of such elevator being out of repair.

The declaration has five counts, charging negligence and breach of duty on the part of defendant, as master, toward plaintiff as servant or employe.

The plea was the general issue, and upon the trial evidence was given showing that said mill was situated just west of the dock of the south branch of the Chicago River, near railroad tracks and fronting on West Randolph Street, was five stories high, in which the defendant carried on an extensive milling

business in the manufacture of flour, etc., employing therein numerous persons who were assigned to services in particular departments of the business; that plaintiff was employed as shipping clerk, and was located for the purpose of performing the chief part of his services in a shed outside the basement of said building, having some dozen or more men under him; that he had been in such service there some thirteen months prior to his injury. The evidence shows that the defendant had provided some twelve years previously, for the purposes of their business, a freight elevator whose shaft extended from the basement floor to the upper floor of the building; that, although a freight elevator, yet many of the employes had been in the habit of using it for the mere purpose of riding in it; that there was a safe and convenient stairway between each floor from the basement up.

The evidence tended to show that the plaintiff was unacquainted with the proper manner of operating this elevator, and that the use of it by him was not required in the performance of the services he was employed to perform, and to which alone he was assigned by his employer.

Evidence was given to the effect that the elevator in question was, at the time it was put in, a reasonably safe and proper one as a freight elevator; and that about a month prior to the injury to plaintiff it was overhauled and put in repair by skillful and competent workmen. But evidence was given tending to show that for some time prior to such injury, although there was no visible or definable defect in the machinery or appliances, yet it would occasionally become unruly and the car would run away if under the control of an inexperienced person, but that it was reasonably safe as a freight elevator while under the control of one acquainted with the proper manner of managing it. The evidence tended to show notice to the foreman in charge of the mill, some time before the accident, of such tendency, aforesaid, in the elevator to run away.

And there was evidence slightly tending to prove that the plaintiff, among other employes, had been warned not to use the elevator for passenger purposes. But as to all these matters, involving the question of negligence on the part of

defendant, and the exercise of ordinary care on the part of plaintiff in going upon and attempting to use said elevator, there was a conflict of evidence. The plaintiff's own testimony tends to show that during the noon hour of October 4, 1884, he, finding that one of the men under him had left, went into the street and engaged another man, whom he wished to put in the place of a man then at work in the fifth story, and bring the latter down to his shed; so, finding the elevator car resting in the basement, rather than go up the stairs, he took the car and went up, the man taking the stairs. When ready to come down he took the car again, but the man went down by the stairs. Between the third and fourth floors the car began to run away with him. He, being unacquainted with the use of the appliances provided for stopping it, made no attempt to do so, but instead sought to save himself by catching onto the edge of the floor next above the basement and was unsuccessful; the car went on and he fell to the bottom, going out onto the basement floor, and was seriously injured by the fall.

There was no direct evidence tending to show that the plaintiff was authorized by the defendant to employ the man and take him to the fifth story and put him in the place of the other man there, or that it was a necessary or probable incident to the authority which he had as such shipping clerk.

At the instance of plaintiff's counsel, the court gave to the jury the following instruction:

"If the jury believes from the evidence that the defendant was possessed of an elevator which was used by its employes in the conduct of its business; that the defendant was guilty of negligence in not keeping such elevator and its appliances in an ordinarily safe condition and state of repair, and that, by reason of such negligence of the defendant, said elevator ran away and fell with the plaintiff while he was in the performance of his duties as the defendant's servant, and as such, using the said elevator and exercising ordinary care for his own safety, as alleged in the declaration; and if the jury further believe from the evidence that, by reason of said elevator's running away and falling with the plaintiff he became confused, bewildered and frightened, through apprehension of

fatal injury or serious bodily harm, and that, in the exercise of ordinary care for his own safety, he sought to save himself by grasping, seizing and holding the edge of one of the floors abutting and adjoining the elevator shaft, and that, while striving so to save himself, he then and there instantly slipped, fell and struck upon and against the said elevator and the basement floor, and thereby received the injuries complained of in the declaration, then, under such circumstances, if found by the jury from the evidence, the plaintiff would be entitled to recover in this action, even though the jury should believe from the evidence that if he had not so grasped, seized and attempted to save himself by holding the edge of the floor as aforesaid, he might not have received said injuries."

The jury found the defendant guilty and assessed the plaintiff's damages at \$5,300, and the court, overruling the defendant's motion for a new trial, gave judgment upon the verdict, and defendant brings the record to this court by appeal, assigning various errors.

Mr. FRANCIS ADAMS, for appellant.

Messrs. JOHN GIBBONS and WILLIAM HOYNES, for appellee.

MCALLISTER, J. A rehearing having been granted in this case, we have re-examined it with much care, and given to it all the consideration which the severe pressure of our duties would permit.

We shall not attempt to state and discuss all the questions presented on behalf of appellant upon which error is predicated, and since a new trial must be awarded, we shall refrain from discussing the facts in any way calculated to prejudice either party upon another trial.

Under our system, no less now than before the establishment of appellate courts, such as this, the law is for the court, the facts for the jury.

After reading all the elaborate arguments, and due consideration of all the evidence, we are brought to the conclusion that, as respects two of the necessary elements of the cause of

action, at least, the evidence is closely conflicting and it is left doubtful which way it preponderates. In such a case it is the well established rule of the Supreme Court that, unless it shall appear that each instruction to the jury on behalf of the successful party stated the law with accuracy and was free from all error calculated to mislead the jury, the judgment must be reversed and the cause sent back for a new trial. *L. S. & M. S. R. R. Co. v. Elson*, 15 Ill. App. 83, and cases cited; *C., B. & Q. R. R. Co. v. Flint*, 22 Ill. App. 508, and cases cited.

That rule—when applied to a case like this, where, as to indispensable elements of the cause of action, the evidence is conflicting and without any clear preponderance (which are solely matters for the jury)—is based upon sound reason, and supported by the dictates of evenhanded justice. For, if in such case the instruction improperly assumes any fact in controversy, or erroneously states the law in favor of the plaintiff, it presumptively prejudices the defendant and gives the plaintiff an indirect and undue advantage.

The court, at the instance of plaintiff's counsel, gave to the jury the instruction which is set out in our statement of the case. That instruction purports to direct the jury as to all the elements necessary to a verdict in plaintiff's favor. It begins by the assumption of material facts in controversy. "If the jury believe from the evidence that the defendant was possessed of an elevator *which was used by its employes in the conduct of its business*; that the defendant was guilty of negligence *in not keeping such elevator and its appliances in an ordinarily safe condition and state of repair*, and that by reason of such negligence of the defendant, said elevator ran away and fell with the plaintiff while he was in the performance of his duties as the defendant's servant, and as such, using said elevator and exercising ordinary care for his own safety as alleged in the declaration," etc. There is very little in that which the jury would understand to be hypothetical. It is mostly the language of assertion, of assumption of facts. It explicitly assumes that the elevator was used by defendant's employes in the conduct of its business, leaving it to be in-

ferred that the plaintiff so used it on the occasion in question, which was a matter in controversy at the trial. It assumes that the defendant did not keep the elevator and its appliances in an ordinarily safe condition and state of repair, another point in controversy on the trial. It directs the jury that plaintiff was entitled to recover if he exercised ordinary care for his own safety after he got upon, and was descending by the elevator, while it was claimed on behalf of defendant at the trial, that, upon the facts and circumstances of the case in evidence, it was gross negligence on the part of the plaintiff, who was ignorant of the proper manner of operating the elevator, to venture upon and attempt to run it, which would preclude a recovery. That was the true issue, but the instruction withdrew it wholly from the consideration of the jury. That was wrong. *P. C. & St. L. R. R. v. Goss*, 13 Ill. App. 619.

It contains no hypothesis of knowledge on the part of the defendant or want of knowledge on the part of the plaintiff as to the elevator being out of repair, both of which were essential to the cause of action. *Beach on Contributory Neg.*, 351, and cases in notes.

We are also of opinion that third instruction for plaintiff was obnoxious to similar objections. But for giving that above mentioned the judgment must be reversed and the cause remanded

Reversed and remanded.

THOMAS L. HUMPHREVILLE ET AL.

V.

JOHN T. DAVIS.

Landlord and Tenant—Forcible Entry and Detainer—Extent of Recovery.

While all the different occupants of premises included within a single lease may be joined in an action of forcible entry and detainer, the recovery against an individual defendant must be limited to such portion of the premises as is actually withheld by him.

[Opinion filed August 1, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. RUFUS KING and M. S. BOWEN, for appellants.

Mr. FRANKLIN P. SIMONS, for appellee.

MORAN, P. J. This was an action for forcible entry and detainer, commenced in justice court against the appellants impleaded with Chester Kinney and D. W. Castle. Judgment was entered in the justice court against all the defendants for the entire premises described in the contract. The case was appealed to the Circuit Court by appellants, and on the trial, on appellee's motion, the suit was dismissed as to the defendants Kinney & Castle.

On the trial it appeared that appellants had leased rooms 23, 24 and 25, of No. 167 and 169 Washington Street, Chicago, by a written lease for a term from May 1, 1884, to April 30, 1885, and that appellants sublet room 25 to Kinney & Castle, until May 1, 1885. On June 5, 1885, at the time of the commencement of this suit, appellants were occupying rooms 23 and 24, and Kinney & Castle were occupying room 25. The uncontradicted testimony of appellants showed that Kinney & Castle did not hold possession of room 25 at the time of the commencement of this suit, or at any time after the first of May, 1885, at the request of or by authority of appellants, and that appellants had no possession or control whatever of said room 25 after said first day of May, 1885, but were in possession of rooms 23 and 24.

The court rendered a judgment against appellants for unlawfully withholding the entire premises. Under the evidence in this case such judgment was erroneous. In an action of forcible entry and detainer, the holding of the possession against the plaintiff is the foundation of the action, and like any other substantial fact must be proved in order to warrant a judgment. It must be shown that the defendant actually

detains the possession himself, or that he has delivered it to another to be held for him.

Under our statute, where there has been one lease for the whole of certain premises, and the actual possession thereof at the commencement of the suit shall be in severalty, while all the different occupants may be joined in one suit, yet the recovery against them shall be several according to their actual holding. Sec. 15, Chap. 57, R. S.

Kinney & Castle went in under appellants, it is true, but there was no proof whatever that they held over after the expiration of appellants' lease from appellee, as the tenants of appellants or with appellants' authority. They could be joined with appellants as defendants to the suit for the recovery of the entire premises, and had they been retained as defendants, judgment could have been taken against them for the portion of the premises which they should be shown to hold possession of. But no judgment could be taken against them for recovery of the rooms of which appellants withheld the possession, and neither can a judgment be sustained against appellants for the room which the proof shows said Kinney & Castle withheld. The recovery against the several parties is required to be, "according as their actual holding shall respectively be found to be."

The fact that the entire premises were leased to the appellants does not authorize a recovery against them in forcible entry and detainer for any portion of the premises which they were not shown to withhold. *Godard v. Lieberman*, 18 Ill. App. 366; *Hersey v. Westover*, 11 Ill. App. 197; *Murphy v. Dwyer*, 11 Ill. App. 246; *Springer v. Cooper*, 11 Ill. App. 267.

The judgment against the appellants for the entire premises was unauthorized, and must therefore be reversed and the case remanded.

Reversed and remanded.

A. W. BULKLEY

v.

ANNIE DEVINE.

Sealed Instruments—Parol Authority to Fill Blanks—Agency—Landlord and Tenant.

1. Parol authority to fill blanks in a sealed instrument is adequate for that purpose.

2. The insertion in a lease of the number of the house intended to be demised is proper, although by parol authority.

[Opinion filed August 1, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. WEIGLEY, BULKLEY & GRAY, for appellant.

The lease was absolutely void for uncertainty. Dingman v. Kelley, 7 Ind. 717; Kea v. Robeson, 5 Ired. Eq. 373; Ingram et al. v. Little, 14 Ga. 182; Habbblewhite v. McMorrine, 6 Mees. & W. 200; Jackson v. Titus, 2 Johns. 430; Patterson et al. v. Hubbard, 30 Ill. 201; Carter v. Barnes, 26 Ill. 455; Hughes v. Streeter, 24 Ill. 648; Shackleford v. Bailey, 35 Ill. 387; Taylor's Landlord and Tenant, Sec. 160.

Blanks in a sealed instrument can not be filled in after its delivery by another person except by the grantor himself, under seal. Shep. Touch. 54; Ingram et al. v. Little, 14 Ga. 182; Simms v. Henry, 19 Iowa, 297; Jackson v. Titus, 2 Johns. 430.

Parol evidence is not admissible to change, alter, vary, modify, or supply the defects in a written lease under seal. Jackson v. Goodyear, 12 Johns. 488; Otis v. Sill, 8 Barb. at pg. 122; Hayden v. Westcott, 11 Conn. 129; Dingman v. Kelley, 7 Ind. 717; Chapman v. McGrew, 20 Ill. 101; Loach v. Farnum et al., 90 Ill. 368; Barnett v. Barnes, 73 Ill. 216.

If a person enters under a void lease and pays rent, he is a

tenant at will. *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 83; *Huyser v. Chase*, 13 Mich. 98.

Messrs. KNICKERBOCKER & HOLDOM, for appellee.

As a matter of law, there has never been any alteration of the lease in the record. It is admitted that the number of the house rented was 55, and that was the number in the lease. That is the house which the parties contracted for, in pursuance of which appellant entered and occupied for the full term of the lease. The number was to be inserted when it was known what the number would be. That was not an alteration within the meaning of the authorities cited by appellant. When the number was filled in it related back to the time of the signing, and made it a complete instrument. The alteration of a written instrument, in order to affect its validity, must be fraudulent, and made with a fraudulent purpose, to change the terms of the contract. Such can not be claimed in the case at bar. *Vogle v. Ripper*, 34 Ill. 100.

See *Parsons on Contracts*, Vol. 2, page 720, where it is stated that in this country generally no immaterial alteration would void an instrument, and that an alteration which only does what the law would do—that is, only expresses what the law implies—is not a material alteration, and therefore would not avoid an instrument. Whether the alteration is material is not a question of fact for the jury, but of law for the court, and the burden of proof of the fact of the alteration rests on the party alleging it.

In *Addison on Contracts*, Vol. 1, page 553, it is stated that where a house was, by mistake, described as number 38, whereas in fact it was number 35, and the 8 was altered into a 5 whilst the lease was in the plaintiff's hands, it was held that the contract was not avoided by the alteration. *Hutchins v. Scott*, 2 Mees. & W. 816.

GARNETT, J. This action was commenced before a justice of the peace by appellee against appellant, to recover rent for the month of August, 1885, for the house known as No. 55, 32d Street, Chicago. On appeal to the Superior Court,

Bulkley v. Devine.

there was judgment for appellee for \$35, the monthly rental and costs, from which Bulkley prosecutes this appeal. The lease sued on was under seal and in duplicate, and when executed by Bulkley the number of the house (which was then uncompleted) not being known, was not in the lease, nor was there anything therein to identify the premises. But at that time appellant agreed (as found by the court below) that when the number was ascertained it should be inserted in the lease.

The number "55" was afterward inserted in the lessor's duplicate by some person unknown, but it never was inserted in the lessee's, nor was appellant ever informed of the insertion before the suit was commenced.

The evidence showed that No. 55 was the house intended to be devised when the lease was executed, and that appellant took possession of it after the date of the lease (December 19, 1884), and remained in possession until April, 1886, paying rent therefor up to August, 1885.

The point to be decided is whether the insertion by parol authority of the number "55" in the lease made it a complete and binding instrument against appellant.

The better opinion now is that parol authority to fill blanks in a sealed instrument is adequate for that purpose, and when filled according to the agreement, the covenantor is bound to perform his covenant in the contract thus completed. *City of Chicago v. Gage*, 95 Ill. 593; *Inhabitants of South Berwick v. Hunter*, 53 Me. 89; *Swartz v. Ballou*, 47 Iowa, 188; *Van Etta v. Evenson*, 28 Wis. 33; *Drury v. Foster*, 2 Wallace, 24; *Whitaker v. Miller*, 88 Ill. 385; *Field v. Stagg*, 52 Mo. 534.

Nor does it make any difference that the incomplete instrument is delivered to one person as agent of the maker, and the insertion is made by another who was not expressly authorized to do so by the party to be charged. *City of Chicago v. Gage*, *supra*; *Swartz v. Ballou*, *supra*.

As all the propositions of law requested by appellant were either erroneous or inapplicable to the facts of the case, they were properly refused, and there is no error in the record.

The judgment of the court below will be affirmed.

Judgment affirmed.

EMMA A. STRONG
v.
WILLIAM M. STRONG ET AL.

Deed as Mortgage—Parol Evidence.

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Parol evidence to establish a deed absolute on its face as a mortgage must be clear and convincing.

[Opinion filed August 8, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon. THOMAS A. MORAN, Judge, presiding.

This is a bill in equity filed August 12, 1882, by plaintiff in error against William W. Strong, Philo Carpenter and Amos J. Snell, alleging that on February 15, 1878, complainant was the owner of the west 80 feet of lot 29 in McNeill's re-subdivision of lots 16, 17, etc., of McNeill's subdivision of lots 6, 7 and 8 in Wright's addition to Chicago; that William W. Strong represented to complainant that he was the owner of the remaining part of said lot 29 and all of lot 28 in said McNeill's re-subdivision, and that Snell had offered to purchase the whole of lots 28 and 29 for \$5,000, but that he, William, could not sell without purchasing of complainant her part of lot 29; that said William also represented to her that if she would convey said west 80 feet of lot 29 to him, he could borrow money on his interest from Carpenter; that she was desirous of selling said west 80 feet, and relying upon the representations and agreement of said William, her brother, to obtain the consideration for said lot, she delivered a deed thereof to her brother, trusting that when he sold the property he would pay to her \$2,000 for the 80 feet, \$1,000 to be paid in cash as soon as the sale could be made to Snell, and \$1,000 to be secured to her by William: that afterward, about February 20, 1878, Strong agreed with

Strong v. Strong.

Carpenter for a loan of \$4,000, and to secure the same conveyed said lots to Carpenter by warranty deed with the expressed consideration of \$5,000; that Carpenter knew when he received the deed that complainant had been paid no part of the consideration therefor; that William afterward procured an extension of the loan and promised complainant that she should have the surplus said lots would bring after Carpenter was paid his \$4,000; that about September 1, 1881, said William and Carpenter sold the lots to Snell for \$7,500, of which \$1,500 was paid in cash and \$6,000 secured by notes and trust deed. The prayer is for an accounting and for general relief.

The answer of Carpenter denies all notice of any of the alleged representations to complainant or of any of the alleged agreements between complainant and William, but says the deed from complainant to William was an absolute and indefeasible deed, and Carpenter had no notice of anything to the contrary; denies loaning \$4,000 to William, and says the deed from William to said Carpenter was absolute; that he purchased said lots from William for \$4,000, and that said deed was not intended as a mortgage; denies that complainant is entitled to any relief.

The bill was taken as confessed by William W. Strong and dismissed as to Snell. On final hearing the bill was dismissed as against Carpenter for want of equity. The complainant sues out this writ of error to reverse the decree.

Messrs. MILLARD & SMITH, for plaintiff in error.

Whenever a deed is shown to have been given as security for a loan of money it is a mortgage. *Clark v. Finlon*, 90 Ill. 245; *Jones on Mort.*, Par. 274, 329, 600; *Campbell v. Worthington*, 6 Vt. 448; *Baxter v. Willey*, 9 Vt. 276.

The existence of a debt is the test. Either a pre-existing debt, or one created at the time, makes the agreement a mortgage. *Jones on Mort.*, Par. 265, 266, 268; *Delahay v. McConnel*, 4 Scam. 156; *Tillson v. Moulton*, 23 Ill. 610; *Edrington v. Harper*, 3 J. J. Marshall, 354.

We maintain that the evidence in this record shows clearly

that the transaction of February 15, 1878, whereby Strong deeded to Carpenter the two lots in question, was that of a loan; that the deed was intended for and was in fact a mortgage; that under the rule of law that "once a mortgage, always a mortgage," that instrument remained a mortgage, and Carpenter sold the lots in question and received the consideration price as the mortgagee, and not as the owner of the property; that at the time plaintiff in error deeded her lot to W. W. Strong, Carpenter was informed of her interest, knew of it and knew that she was not receiving her pay for her lot; that Strong's agreement with plaintiff in error that she should have all of the equitable interest in the two lots over and above the \$4,000 advanced by Carpenter to Strong was an equitable assignment, which since that date has been treated as such and frequently confirmed by Strong, and that his interest or equity in the lots was assignable and was of such a nature that courts of equity will recognize and protect such an assignment.

In equity all contracts and agreements may be assigned and will be protected. *Carr v. Waugh*, 28 Ill. 418; *Morris v. Cheney*, 51 Ill. 451; *Chapman v. Shattuck*, 3 Gilm. 49; *Littlefield v. Story*, 3 Johns. 426; *Ridgeway v. Underwood*, 67 Ill. 420; *Story on Contracts*, Sec. 379 g; *Bispham's Principles of Equity*, 164-5; *Story's Equity Juris.* 1046-47.

Messrs. COMSTOCK & HESS and FRANK J. CRAWFORD, for defendants in error.

GARNETT, J. The object of this bill is to impress upon the deed executed by William W. Strong to Philo Carpenter the character of a mortgage. The deed is absolute on its face, and the consideration paid therefor, if not full and entirely adequate, was about a fair equivalent. To convert such an instrument into a mortgage by parol proof, as the plaintiff in error now seeks to do, the authorities uniformly require that the evidence must be clear and satisfactory. *Price v. Karnes*, 59 Ill. 276; *Remington v. Campbell*, 60 Ill. 516; *Magnusson v. Johnson*, 73 Ill. 156; *Wilson v. McDowell*, 78 Ill. 514; *Hancock v. Harper*, 86 Ill. 445; *Knowles v. Knowles*, 86 Ill. 1; *Bartling v. Brasuhn*, 102 Ill. 441.

In re Annie Barnes.

The proof touching the question whether the transaction was a purchase or loan by Carpenter was conflicting, and in many instances directly contradictory. Even if we felt uncertain about the correctness of the conclusion of the court below, the decree would have to be affirmed. But any hesitation is removed by the evidence of William W. Strong, a witness called in behalf of complainant, who testifies that he never had or claimed, or thought of any interest in the lots after his deed to Carpenter. The witness could not have meant by this disavowal that he had assigned his equity of redemption to complainant, because the bill alleges that, at the time the loan was extended, William promised her that she should have all the lots brought, after Carpenter was paid the \$4,000. That was some time after the deed was delivered to Carpenter, and if it was intended as a mortgage the equity of redemption must have remained in William until he assigned it, as alleged, to complainant. The complainant is equally unfortunate in the proof of notice to Carpenter that she had not been paid or secured the purchase price for the west 80 feet of lot 29. The record fails to show to our satisfaction that Carpenter was notified that she was not secured.

The finding of the court below was manifestly correct. The decree is affirmed.

Decree affirmed.

MORAN, P. J., took no part in the decision of this case.

IN RE ANNIE BARNES, A DEPENDENT GIRL.

Practice—Amendment of Record.

The record can not be amended from the judge's knowledge but only from his minutes, after the expiration of the term.

[Opinion filed August 8, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. N. M. JONES, for appellant.

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A uniform line of decisions runs through our Appellate and Supreme Courts, beginning in the 24th Illinois, announcing and emphasizing the doctrine concisely laid down in the case of *Robinson v. Brown*, 82 Ill. 279, "that the court had no power at a subsequent term to change the judgment in any material respect." We simply refer to a few of the more prominent and pronounced cases: *Cook v. Wood*, 24 Ill. 297; *Oetgen v. Ross*, 36 Ill. 335; *Messervey v. Beckwith*, 41 Ill. 452; *McKindley v. Buck*, 43 Ill. 488; *Lill v. Stookey*, 72 Ill. 495; *Dunham v. So. Park Comm'rs*, 87 Ill. 185; *Becker v. Sauter*, 89 Ill. 596; *Goucher v. Patterson*, 94 Ill. 525; *Gillett v. Booth*, 6 Ill. App. 424; *Kihlholz v. Wolff*, 8 Ill. App. 371.

Mr. F. E. HALLIGAN, for appellee.

The court made the record show the judgment "then and there ordered and made," and nothing more. This was the duty of the court and was within its power.

Freeman on Judgments, section 72, uses the following language:

"The doctrine in this country in reference to amendments of records may be said to have crystallized into the following legal propositions, namely: That any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere clerical error, and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order, decree or proceeding to which one of the parties to the cause was of right entitled, and as a matter of course, according to law and the established practice of the court, it will sometimes be presumed to have occurred through the misprision of the clerk, and will always be amendable, if from other parts of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order or decree the party was entitled to."

In *Ives v. Hulce*, 17 Ill. App. 30, the court says:

"This we understand to be the crucial test as to whether an amendment should be allowed, and upon principle it is not very material whether the misprision is that of the judge or clerk, if the sentence which the court intended has not been entered up."

To the same effect, *Wyman v. Buckstaff*, 24 Wis. 477. Also, *Kilmer v. People*, 106 Ill. 529; *Gaff v. Spellmeyer et al.*, 13 Ill. App. 294; *Tucker v. Hamilton*, 108 Ill. 464; *O'Conner v. Wilson*, 57 Ill. 226; *Dunham v. S. Park Com'rs*, 87 Ill. 185; *Coughran v. Gutchens*, 18 Ill. 390; *Cook v. Wood*, 24 Ill. 295; *Church v. English*, 81 Ill. 442; *Lill v. Stookey*, 72 Ill. 495; *Cairo & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419.

GARNETT, J. On May 26, 1887, the County Court of Cook County entered a final order in this cause, appointing Mrs. G. B. Marsh guardian of Annie Barnes, and directing the latter to be committed to the Illinois Industrial School for Girls at Chicago, to be kept there until she arrives at the age of eighteen years, unless sooner discharged according to law. On October 6, 1887, in the September term of the court, on motion of Ida Barnes, mother of Annie, another order was entered in the cause amending the order of May 26, 1887, so as to give the court the power (among other things) to vacate the same so far as it directed a commitment to that school and the appointment of a guardian, and the order of commitment and appointment of the guardian was, by the last order, set aside, and a commitment to another school and the appointment of another guardian ordered.

The Industrial School excepted to the order of October 6, 1887, and seeks to reverse the same on this appeal.

The amended order recites that the amendment was omitted from the original order by inadvertence and mistake, and it is stated in the bill of exceptions that the court knew of its own knowledge the facts in relation to the original judgment and on which the record thereof was amended.

The amendment was substantial, and could not be made from the knowledge of the judge. It must be based on the

VOL. 27.] Mechanics Loan & Trust Co. v. American Ex. Nat. Bk.

judge's minutes. Cairo & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Coughran v. Gutcheus, 18 Ill. 390; Gillett v. Booth, 6 Ill. App. 432.

The order of the County Court entered on the 6th day of October, 1887, is reversed.

Order reversed.

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MECHANICS LOAN AND TRUST COMPANY OF CHICAGO
ET AL.
V.
AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO
ET AL.

Assignment—Distribution—Right of Secured Creditors to Dividends—Sale of Collaterals without Prejudice.

1. Upon the distribution of an estate under an assignment creditors who hold collateral security are entitled to share equally with unsecured creditors in any and all dividends paid.

2. Where a holder of collaterals has converted them into cash on the faith of an order of court that he might do so without prejudice, his rights are not thereby affected, the court having no power to require him to make the change.

[Opinion filed August 8, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. RICH & STONE, for appellants.

The County Court should have required the appellees to realize upon the collateral held by them, and to apply the proceeds in payment or part payment of their said claims as requested by appellants.

It was within the power of the court to require the appellees to convert said property into money, and apply the same, as

far as it would go, in payment of their claims, before they should be permitted to prove their claim and receive a dividend from the assets in the hands of the assignee. *Wurtz v. Hart*, 13 Iowa, 515; *In re Knowles*, 13 R. I. 90; *Besley v. Lawrence*, 11 Paige, 581.

The appellees having, before the time of the order for a dividend made by the County Court, converted into money all of the said securities remaining in their hands, after the allowing of their claims by the County Court, to the amount of \$70,860.84, the said County Court should have directed the assignee to pay a dividend only upon the amount of their claims after deducting the net proceeds of the sale of collateral then in their possession.

We are aware of the decision of our Supreme Court in the case of *Bates v. Paddock*, 118 Ill. 524, holding that a creditor is entitled to a dividend on his whole claim out of the assigned assets, notwithstanding there was security held for the claim; and we understand the County Court directed the dividend to appellees in this case upon the strength of that decision. But we claim that this case is clearly distinguishable from the case under consideration in that suit. There the security had not been realized upon. There was likely to be long delay in realizing money on the same, and there was uncertainty as to what the mortgaged property would bring at forced sale.

If the debtor had been sued in that case there could have been no defense of payment, in part even, to reduce the amount of indebtedness remaining, and the court might find good reason for following the Pennsylvania line of decisions rather than that of New York, Iowa and Rhode Island. It would be going a good deal farther in the same direction, we think, to hold in this case that appellees were entitled to the same dividend as other creditors on the full amount of their claim as established on the hearing of the exceptions to their claims, notwithstanding they had been subsequently, but before the order for dividend, paid nearly in full the amounts upon which dividends were ordered. We do not find, in any of the cases cited, any one where the money had been actually received by

Vol. 27.] Mechanics Loan & Trust Co. v. American Ex. Nat. Bk.

claimants as proceeds of securities held before order of distribution and dividend under the assignment proceedings.

Messrs. SWIFT & CAMPBELL, for appellees.

"The rule of law is well settled that an assignee to whom property is transferred for the payment of the assignor's debts, takes it subject to all liens to which it is then liable." *O'Hara v. Jones*, 46 Ill. 288; *Yates v. Dodge*, S. C. Ill. Nov. 11, 1887; 13 *Northeastern Rep.* p. 847. The rule of law is equally well settled that the assignee has no greater right than the assignor had. *Hardin v. Osborn*, 94 Ill. 571; *Jack v. Weinnett*, 115 Ill. 111. The only right, therefore, which the assignee of Sykes had was the right to redeem the seed which appellees held as security, by paying their claims. When appellees proved their claims they offered to surrender the seed to the assignee upon payment of their claims, and notified him that they should ask for a dividend upon the full amount of their claims, without deduction on account of their security.

As the assignee had no right except to redeem, and as it was not claimed that the seed held as security was greater in value than the claims against which it was held, the court rightly refused the prayer of appellant's petition. But the court entered an order upon his own motion that the appellees "have leave to sell the seed held by them as collateral security without prejudice to their rights."

In view of the recent decision of the Supreme Court in the matter of *Bates*, assignee, 118 Ill. 524, the County Court rightly refused to enter an order compelling appellees to sell their security.

The County Court found, at the time of allowing the claims, that all moneys received up to that time had been credited.

The County Court was right in ordering a dividend paid upon these claims as allowed, without reference to the fact that the claimants held security. The law upon this point is now settled in this State. In re *Bates*, 118 Ill. 524; *Yates v. Dodge*, 13 *Northeastern Rep.* 847.

The Supreme Court of the United States has also decided this question in the same way. *Lewis v. U. S.*, 92 U. S. 618.

MORAN, P. J. James W. Sykes made a voluntary assignment for the benefit of his creditors, which was duly filed, and the County Court proceeded to administer the insolvent estate. Claims were proved against the estate to the amount of \$265,885.92, and the assets which came to the hands of the assignee amounted to \$47,787.68.

Appellant's claim was allowed for \$92,253.19, and the claim of appellee, the American Exchange National Bank, for \$106,800, and of appellee, the Canadian Bank of Commerce, for \$27,400, were filed. It appeared on taking the proofs of said claims, that appellees each held certain warehouse receipts for timothy seed, which had been issued to Sykes, and had been indorsed by him to the appellee banks respectively, as collateral security to the notes of Sykes held by the said banks.

Certain motions and counter motions were made by the parties and various orders were entered by the court, which, in the view we take of the case, it is unnecessary to allude to further than to say the result was, that each of the appellees realized on a portion of its collaterals and credited the amount so obtained on its claim, and the claim of the American Exchange National Bank, so reduced, was allowed by the court at \$69,241.94, and the claim of the Canadian Bank of Commerce at \$15,848.51.

At the time of such allowance of such claims, the American Exchange Bank held a balance of collateral undisposed of which was then worth at the market value \$56,771.65, and the Canadian Bank held like collateral of the value of \$12,236.49.

Appellant moved the court for an order directing appellees to realize on such balance of collateral held by them, but the court refused such order and entered an order finding that it was for the interest of all the creditors of the insolvent estate that said banks have leave to sell the collateral security held by them without prejudice to any of their rights, the proceeds of such sales not to be applied upon the indebtedness of Sykes to them, but to be held by them in all particulars as the collateral itself was then held, and it was so ordered. Thereupon the American bank sold its said collaterals and received in

money over all expenses \$55,851.76, and the Canadian Bank sold and obtained the sum of \$12,242.24. Shortly thereafter the matter of distribution by the assignee came on to be settled by the court, and appellant moved the court to direct the assignee to pay a dividend upon the amount of appellees' claims only, which should remain after deducting the net proceeds of said collaterals, which net proceeds were then in the hands of said appellees respectively; the court refused to so direct, but ordered the assignee to pay to said appellees upon the amount of their said claims as allowed, the same dividend as should be paid to other creditors of the estate.

This is the order chiefly complained of by appellant and it is contended by it that the security having been turned into cash, this case is on this point taken out of the rule as established in *In re Bates*, 118 Ill. 524. It is, among other things, clearly laid down in that case that the court has no power to compel the holder of the security to realize upon the same. The County Court then properly refused to direct appellees to sell the seeds held by them and credit the proceeds on their respective claims. It clearly appears from the record that appellees, in selling the balance of the seeds held by them, did so on the faith of the order of court that they might do so without prejudice to their rights, and might hold the proceeds as they held the collateral. The sale was for the interest of all the creditors and to prevent the collaterals from being eaten up by warehouse charges and other expenses.

We think the fact that the collaterals were turned into cash under such circumstances does not make this case an exception to the doctrine announced by our Supreme Court. The decisions in Iowa and New York are in support of appellant's contention, but the rule as announced in those States is not followed by our Supreme Court, but rather the doctrine which obtains in Pennsylvania as held in *Morris v. Alwine*, 22 Pa. St. 441, cited with apparent approval in *re Bates*, where the case is stated as one "of distribution under an assignment for the benefit of creditors, and a creditor by bond and by mortgage was held entitled to a *pro rata* dividend on his whole claim, even though he had collected the greater part of it out

Hanchett v. Buckley.

of the mortgaged property, the amount collected and the dividend together not being sufficient to satisfy the debt. He was not restricted to a dividend on his claim, as reduced by the proceeds of the mortgage."

The order appealed from must be affirmed.

Order affirmed.

GARNETT, J., took no part in the consideration of this case.

SETH F. HANCHETT, FOR USE, ETC.,

v.

A. W. BUCKLEY ET AL.

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Replevin—Action on Bond—Parties—Warehouse Receipt as Collateral—Sale—Burden of Proof—Evidence.

1. The pledge of a warehouse receipt as collateral security for a note is in legal effect a sale to the pledgee, for a valuable consideration, of the property called for by the receipt, and vests in him the legal title thereto.

2. Where there has been a breach of a replevin bond, any person injured may maintain an action thereon in the name of the sheriff to his own use.

3. In an action on a replevin bond wherein it is claimed that the action of replevin was not tried on its merits and that a certain bank, one of the parties for whose use the action is brought, became the purchaser of the property in question by accepting a warehouse receipt as collateral, it is *held*: That the burden was on the plaintiff to show that the bank had notice of the fraud in the original purchase; that certain of the instructions were erroneous; that it was unnecessary to prove that a *retorno habendo* had been awarded, it being admitted by the pleadings; and that evidence as to whether the note secured was presented to the indorser and whether he was worth the amount thereof, was improperly admitted.

[Opinion filed August 1, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action on a replevin bond executed by defendants in error in behalf of Simon Auerbach & Company. The

breach of the bond alleged in the declaration was that the suit was dismissed and *retorno habendo* ordered, and that the tobacco, which had been taken, had not been returned.

The defendants pleaded that the action of replevin was not tried on its merits, and that plaintiffs were not damnified more than one cent, and averred that the property in said replevin writ mentioned was the property of Simon Auerbach & Company, and not of plaintiff. To this plea plaintiff filed two replications: 1st. That the goods in the replevin writ mentioned were the property of the parties for whose use this action was brought. 2d. That the property was not the property of Simon Auerbach & Company, but was the property of the Ricker National Bank, to hold the said goods and chattels as a pledge, to be kept by said bank until said defendant, Charles Goodman, should pay to said bank \$2,000, owing by said Goodman to said Ricker National Bank.

The verdict was for one cent damages, which verdict plaintiff moved the court to set aside, and for a new trial, but the court overruled the motion and entered judgment on the verdict, and the case is brought here for review by a writ of error.

Messrs. KRAUS, MAYER & STEIN, for plaintiff in error.

The pledge of the tobacco by Charles Goodman to the Ricker National Bank, as security for, or in payment of, a pre-existing debt, was a sale upon a valuable consideration, and is entitled to the same protection as if the Ricker National Bank had purchased the tobacco outright and paid a full and adequate consideration therefor. *Butters v. Haughwout*, 42 Ill. 18; *Manning v. McClure*, 36 Ill. 490; *Kranert v. Simon*, 65 Ill. 344; *Van Duzer v. Allen*, 90 Ill. 499; *Benjamin on Sales*, Sec. 433; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Montague v. Hanchett*, 20 Ill. App. 222.

Where the sale was made to a party guilty of a fraud, and possession is delivered by the vendor to the vendee in execution of the contract of sale, then the title passes and the sale is not void but merely voidable; and if the vendee transfer the goods by way of sale or pledge to an innocent third person

Hanchett v. Buckley.

for a valuable consideration, before the original sale is voided, the rights of said original vendor will be subordinate to those of such third person. Benjamin on Sales, Sec. 433; Brundage v. Camp, 21 Ill. 329; Michigan C. R. R. Co. v. Philips, 60 Ill. 190, 197; Jennings v. Gage, 13 Ill. 610; Chicago Dock Co. v. Foster, 48 Ill. 507.

The burden of proving that the Ricker National Bank had notice of the alleged fraud, by which Charles Goodman purchased the property in question from the original vendors, is upon the original vendors as against the Ricker National Bank. Brown v. Riley, 22 Ill. 46; Butters v. Haughwout, 42 Ill. 18; Jewett v. Cook, 81 Ill. 266; Easter v. Allen, 8 Allen, 9, 10; Montague v. Hanchett, 20 Ill. App. 222.

A seller can not rescind a sale for fraud as against a remote purchaser or pledgee, unless the original seller proves that such purchaser or pledgee, at or before his purchase, had notice of the fraud or was not a *bona fide* purchaser for value. Benjamin on Sales, Sec. 433; Butters v. Haughwout, 42 Ill. 18; Ohio, etc., Railroad v. Kerr, 49 Ill. 458; Chicago Dock Co. v. Foster, 48 Ill. 507; Dickerson v. Evans, 84 Ill. 451; Henson v. Wescott, 82 Ill. 224; McNab v. Young, 81 Ill. 11; Van Duzer v. Allen, 90 Ill. 499; Kranert v. Simon, 65 Ill. 344; Brundage v. Camp, 21 Ill. 329; Jennings v. Gage, 13 Ill. 610; Montague v. Hanchett, 20 Ill. App. 222; Jones v. Simpson, 116 U. S. 609.

The delivery of the warehouse receipt by Charles Goodman through his brother, Morris Goodman, to the Ricker National Bank, was a good symbolic delivery; it forms a good delivery in the performance of the contract of pledge, and is equivalent to an actual delivery of the actual property itself. As Jones on Pledges says, Sec. 280: "The transfer of the certificate transfers to the vendee or pledgee the legal title and constructive possession of the property, and the warehouseman from the time of the transfer becomes his bailee." Benjamin on Sales, Sec. 697; McNab Bank v. McRae, 107 Ill. 281; Newcomb v. Cabell, 10 Bush. 460; Burton v. Curryea, 40 Ill. 320; Salter v. Wollams, 2 M. & G. 650; Shaw v. R. R. Co.,

101 U. S. 557; Sergeant v. Central Warehouse Co., 15 Ill. App. 553.

Messrs. WEIGLEY, BULKLEY & GRAY, for defendants in error.

There is no breach of the condition of the bond providing for a return of the property "in case return thereof shall be awarded," until the court awards such return; that is, until there is a judgment in the replevin suit awarding a *retorno habendo*. Clark v. Norton, 6 Minn. 412; Ladd v. Prentice, 14 Conn. 108; Thomas v. Irwin, 90 Ind. 557, and cases cited.

A warehouse receipt is not negotiable in the sense that commercial paper is. It may be assigned by indorsement and delivery, and thereby convey the interest of the assignor. Canadian Bank of Commerce v. McCrea, 106 Ill. 281; Gray v. Agnew, 95 Ill. 315. In the case of a pledge the legal property does not pass as in the case of a mortgage with a condition of defeasance, but the general ownership remains with the pledgor, and only a special property or lien passes to the pledgee. Union Trust Co. v. Rigdon, 93 Ill. 465.

An execution becomes a lien upon the personal property of the defendant from the time it is delivered to the sheriff to be executed. Section 9, Ch. 76, Rev. Stat.; Leach v. Pine, 41 Ill. 65; Field v. Macnllar, 20 Ill. App. 392.

An attachment or execution creditor of a fraudulent vendee obtains no rights as against the rights of the defrauded vendor. Sweitzer v. Tracy, 76 Ill. 345; Doane v. Lockwood, 4 N. E. Rep. 500; Farwell v. Hanchett, 11 N. E. Rep. 875.

A party who has no title can give none. Hutchinson v. Oswald, 17 Ill. App. 28; Montague v. Ficklin, 18 Ill. App. 99; Fossette v. Osborne et al., 32 Ill. 424; Burton v. Curyea, 40 Ill. 329; Klein v. Seibold, 89 Ill. 540.

A stranger to the replevin bond, who is neither a party to the suit nor the bond, can not maintain an action thereon against the obligors. Pipher et al. v. Johnson, 9 N. E. Rep. 376.

The object of the replevin bond is to indemnify the sheriff and furnish an additional remedy to the defendants in that suit. Petrie v. Fisher, 43 Ill. 442; Fahnestock v. Gilham, 77

Ill. 637; Richards et al. v. Rape, 3 Ill. App. 24; Humphrey et al. v. Taggart, 38 Ill. 229.

MORAN, P. J. To establish its right to damages the plaintiff in error, The Ricker National Bank, introduced evidence tending to show that prior to November 1, 1884, one Charles Goodman was indebted to said bank on a note for \$2,000, indorsed by his brother, Morris Goodman, which note was due; that said Charles Goodman desired an extension of the loan, and through his brother negotiated with the bank to obtain it, and finally succeeded, by pledging a warehouse receipt for two bales of tobacco as collateral security for the payment of the note, and procuring the note to be indorsed by his brother.

The tobacco was purchased by Charles Goodman from Simon Auerbach & Company, and was delivered to him about the 1st of October, 1884, and was by him placed in the warehouse about November 1, 1884, and the receipt, afterward pledged to the Ricker National Bank, for the two bales in controversy, was taken from the warehouse company and was delivered to the said bank prior to November 5, 1884. The two bales of tobacco mentioned in the warehouse receipt were taken by the sheriff on the replevin writ issued in the case in which appellees executed the bond sued on.

To sustain the defense, appellees introduced evidence tending to show that there was fraud in the obtaining of the tobacco from Auerbach & Company, in that when Charles Goodman purchased the same he knew he was insolvent, and bought the property with the intention not to pay for it. There were some circumstances connected with the pledging of the warehouse receipt to appellant upon which appellees base a contention that the Ricker National Bank had notice of the alleged fraudulent purchase of the tobacco by said Goodman, and was not, therefore, a *bona fide* holder of the warehouse receipts.

An inspection of the record leads to grave doubt as to whether there is any evidence to support such contention, but for the purpose of this review, treating this issue, as the trial

court did, as one which required the evidence to be submitted to the jury, we are of opinion that such error was committed in the modification of instructions asked for the plaintiff and in giving instructions requested by the defendant, as requires that the verdict be set aside and a new trial granted. The pledge of the warehouse receipts as collateral security to the note was in legal effect a sale to the bank of the tobacco called for by the receipts for a valuable consideration, and vested the legal title thereto in the bank (*Chicago Dock Co. v. Foster et al.*, 48 Ill. 507), and appellant had the ownership in the same, unless appellee proved that the bank received the receipts with knowledge that the vendee, Goodman, had obtained the tobacco from the vendor by fraud. The bank being a *bona fide* purchaser for value, the burden was on appellees to show that it took with notice of the fraud in the original purchase. *Easten v. Allen*, 8 Allen, 10; *Jewett v. Cook*, 81 Ill. 266; *Benjamin on Sales*, Sec. 433; *O. & M. R. R. Co. v. Kerr*, 49 Ill. 458.

At the request of the appellees the court gave to the jury defendants' instruction No. 6, as follows:

"The court instructs the jury that before the Ricker National Bank can occupy any better position in regard to the property in question than the said Charles Goodman, it must appear from the evidence that the said Ricker National Bank obtained said property, either as security or owner, for a valuable consideration passing from the said Ricker National Bank to the said Charles Goodman at the time of obtaining the same; and also that it obtained said property from the said Goodman without any notice of the fraud by which he obtained the same."

The instruction, while it does not in direct terms misstate the law, yet is necessarily misleading. It is so couched as to give the jury to understand that the burden was on appellants to show that it obtained the property without notice of the fraud. This placing the burden of proof as to notice of the fraud upon the wrong party is more directly done in the court's modification of plaintiff's second instruction, which, as given, is as follows, the modification by the court being inclosed in parenthesis:

"If the jury believe from the evidence that the two bales of tobacco in controversy were sold and delivered by Simon Auerbach & Company to Charles Goodman, and that they accepted their promissory note in payment for the same, and that afterward the said Goodman pledged the said two bales of tobacco to the Ricker National Bank at Quincy, Illinois, by the transfer and delivery to said bank of the warehouse receipts for the same, introduced in evidence, to secure the payment of his *bona fide* debt of two thousand dollars due to said bank (and that said bank received said warehouse receipts as collateral security for the payment of said sum of money in good faith without notice of any fraud in the purchase of the goods in question), and that said debt is wholly unpaid, then said bank, by said transfer and delivery of said warehouse receipts, acquired a special property in said two bales of tobacco, and are and were entitled to hold the same until said debt is fully paid, and the jury may find for the plaintiff and assess the damages at the value of the said two bales."

It will be seen that, by the modification, the court made it a condition of the plaintiffs' right to recover, that, in addition to all the other facts contained in the instruction, it should appear that it took the warehouse receipts without notice of the fraud, whereas the law is that the plaintiff should recover on the other facts supposed in the instruction being found in its favor, unless it appeared from the evidence that it took the receipt with notice of the fraud. *Jones v. Simpson*, 116 U. S. 609; *Montague v. Hanchett*, 20 Ill. App. 222.

The same error appears in the modification of other of plaintiff's instructions, but it is deemed sufficiently pointed out in what has been said, so that its repetition on another trial may be avoided, and the discussion of the other instructions in detail is not necessary.

The court permitted Morris Goodman, the brother of Charles Goodman, and who was an indorser on the note for which the warehouse receipts were held as security, to be asked on cross-examination, against the objection of plaintiff, whether he was worth the amount of the note and whether the note was ever presented to him for payment. We think

the testimony wholly immaterial and that it was error to admit it.

It is contended by appellees that, as the Ricker National Bank was not a party to the replevin suit, it is a stranger to the bond and is not, therefore, entitled to the benefit of a recovery upon it. The suit may be maintained by the sheriff who has the legal right of action for the use of any person he chooses.

When the conditions of the replevin bond are broken, any person injured may sue in the name of the sheriff to his own use. *Atkin v. Moore*, 82 Ill. 240; Replevin Act, Secs. 10 and 25, Chap. 119, R. S.

It is further contended that plaintiffs could not have had a verdict, as there was no evidence introduced to show that a *retorno habendo* had been awarded on the dismissal of the replevin suit. It is alleged in the declaration that there was a judgment of *retorno*, and that is not denied by the plea, so that it stands admitted by the record. What is admitted by the pleadings need not be proved.

The judgment will be reversed for the errors pointed out, and the case remanded to the Superior Court.

Reversed and remanded.

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ANTON MARTIN

V.

SIGMUND HOCHSTADTER ET AL.

Practice—Appeal from Justice—Affidavit of Merits—When to be filed—Joinder in Error—Jurisdiction.

1. Where an action commenced before a justice with an affidavit of claim is appealed to the Circuit Court, the defendant is not required to file an affidavit of merits until the cause is reached for trial.

2. Where the appellee has joined in the errors assigned, this court has jurisdiction, although the appeal might have been confined to narrower issues.

Martin v. Hochstadter.

[Opinion filed August 1, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. C. C. Boggs, Judge, presiding.

Mr. ALLAN C. STORY, for appellant.

Messrs. HOFHEIMER, ZEISLER & ROSENBERG, for appellees.

GARNETT, J. In this action, which was commenced before a justice of the peace by appellees against appellant, there was an affidavit of claim filed with the justice in pursuance of section 34, Chap. 79, of the Revised Statutes, and judgment for \$150.80 and costs was rendered in favor of the plaintiffs, from which the defendant appealed to the Circuit Court. The appeal bond was filed in the office of the clerk of said court June 29, 1886, and on July 9, 1886, the justice transmitted to that court the transcript and papers in the cause.

The appearance of the plaintiff was entered in the Circuit Court on July 9, 1886, and that of the defendant on June 29, 1886. On August 18, 1886, that being the third day of the August term, the defendant's default was entered for want of an affidavit of merits and judgment rendered against him. On October 1, 1886, that being in the September term of the court, the defendant moved the court to vacate the default and judgment. The motion was denied and exceptions taken by defendant, who brings the record to this court and assigns as error, not only the overruling of the motion, but the entry of the judgment for want of an affidavit of merits. The appeal would only have brought before this court the order of the Circuit Court denying the motion, had the appellees taken the necessary steps to confine it to that question. But they have, without objection, practically joined in the errors assigned by filing their brief and argument without insisting upon that point, and that gives this court jurisdiction to inquire into the propriety of the judgment itself. *Danforth v. Perry*, 20 Ill. App. 130.

Section 34, Chap. 79, enacts that if the plaintiff in any suit

on a contract for the payment of money shall file with the justice at the time of commencing such suit an affidavit showing the nature of his demand and the amount due him, after allowing all just deductions, credits and set-offs, he shall be entitled to judgment in case of default, but the justice may require further evidence, provided, "that in case of appeal from the judgment of the justice of the peace, as aforesaid, such affidavit shall have the same force and effect in the appellate court as if such suit had been commenced in such appellate court."

To ascertain what force and effect is intended to be given, in case of appeal, to the plaintiff's affidavit of claim, it is necessary to refer to Sec. 37, Chap. 110, of the Revised Statutes. The cases there provided for are those requiring written pleadings. The plaintiff's affidavit in such cases is to be filed *with* his declaration, and the defendant's affidavit *with* his plea. In no case is the affidavit required to be filed before the time to plead has arrived. The pleadings before a justice of the peace are oral. When the cause is appealed to the Circuit Court there is no change in the pleadings; they are still oral and the cause is to be heard *de novo*.

The question is, in case of appeal from the justice where the plaintiff has duly filed his affidavit of claim, *when* must the defendant file his affidavit of merits.

Not before the justice, because the statute makes no provision for that officer to receive it either before or after judgment. It would be unjust to require him to file it at the time when the transcript is filed with the clerk of the Circuit Court, because the justice has twenty days to send up the transcript. He may send it the day of the appeal or the tenth day after, but the defendant has no means of knowing when it will be filed. The law should be very plain before we could require of a party to such a suit so unreasonable a duty as continuous watching, during so long a period, for the filing of the transcript.

Neither Sec. 34, Chap. 79, nor Sec. 37, Chap. 110, requires in terms that the affidavit of merits shall be filed at any specified term. A reasonable interpretation must be given these

Lapp v. Pinover.

two sections which are thus, to some extent, blindly interwoven. As in case of an action commenced in the Circuit Court where written pleadings are required, the defendant may defer filing his affidavit until he is obliged to file his plea, so in case of appeal from a justice the intention was to give the defendant the right to file his affidavit when the time comes for him to plead. His plea is oral and is made when the cause is reached for trial. His affidavit is due then and not before. If he fails to file it, judgment may be rendered on the plaintiff's affidavit of claim without further proof.

The court erred in rendering the judgment for want of an affidavit of merits, and for that error the judgment will be reversed and remanded.

Reversed and remanded.

PETER LAPP ET AL.

V.

ALEXANDER PINOVER ET AL.

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Trover—Right of Possession—Sales—Instructions.

1. The plaintiff can not recover in an action of trover, unless he had the right to immediate possession of the goods in question at the time of their conversion.

2. A re-sale of goods to the vendor, the possession remaining with the vendee, is void as to a subsequent *bona fide* purchaser without notice.

3. An instruction which purports to embrace every element essential to a recovery, is defective if any material element is omitted.

[Opinion filed August 8, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

This was an action of trover by appellees against appellants to recover for an alleged wrongful conversion by the latter of

a quantity of jewelry, the goods, etc., of the former. Upon a trial, under the general issue, the appellees had judgment upon a verdict for \$891.50 damages, besides costs, from which the defendants took this appeal.

It appears that the plaintiffs below, being wholesale dealers in jewelry in the city of New York, June 24, 1884, sold and delivered to one W. T. Carinder, at Kansas City, Missouri, where the latter was carrying on a retail business in jewelry, etc., the jewelry in question; that Carinder had the same in his possession; but that July 22, 1884, an arrangement was entered into between him and plaintiffs whereby Carinder surrendered up the bill of sale of June 24, 1884, to the plaintiffs, and the goods were entered on their books as held by Carinder under a consignment, and a memorandum to that effect was sent by the former to the latter, the possession of the same by Carinder remaining unchanged. It appears that Carinder had sold two articles of said jewelry for which he did not account to plaintiffs, and that September 4, 1884, he pledged the whole of the remainder of said goods, with others, and delivered them into the possession of one Schwartz, a pawnbroker, as security for a loan of \$1,100, made by the latter to him; that September 5, 1884, Carinder, in consideration of a past indebtedness of some \$2,200, due from him to the defendants, and advances then made by them for him, sold his entire stock of goods, including the jewelry in question, to defendants, who took possession thereof after redeeming the same from said pawn and the levy of a writ of attachment.

There was evidence tending to show that defendants, before they completed said purchase, had notice that Carinder held the goods in question upon consignment. But, as to that, the evidence was conflicting. The court, at the instance of the plaintiffs, gave to the jury the following instruction:

"For the plaintiffs, the court instructs the jury, that if they believe, from the evidence, that the goods in question in this suit were, at the time they were taken by the agents of the defendant, in the possession of Carinder on memorandum or on consignment, and that the defendant, while such goods were so held by Carinder on memorandum or on consignment,

Lapp v. Pinover.

obtained possession of the same out of the usual order of sale or course of business and converted the same to their own use, then you will find for the plaintiffs."

To the giving of which instruction the defendants then and there duly excepted.

Mr. S. S. GREGORY, for appellants.

Messrs. ABBOTT & BAKER, for appellees.

MCALLISTER, J. The sale and delivery of the goods in question, June 24, 1884, by the plaintiffs to Carinder, vested in the latter the title to the goods. And the re-sale of them back to plaintiffs, July 22, 1884, by Carinder, being without any change of possession of the goods, would, if entirely formal in other respects, be void as to *bona fide* creditors, purchasers or pledgees, without notice. *Ketchum v. Watson*, 24 Ill. 591; *Lewis v. Swift*, 54 Ill. 436; *Thompson v. Wilhite*, 81 Ill. 356; *Lefever v. Mires*, 81 Ill. 456; *Gradle v. Kern*, 109 Ill. 557; *Bastress v. Chickering*, 18 Ill. App. 198.

The instruction given by the court to the jury set out in the statement of the case, purports to instruct the jury as to all the elements of the case essential to a recovery. That instruction contains no hypothesis as to whether the plaintiffs reduced the goods to possession, upon the re-sale of them; or whether the defendants had notice of the arrangement that Carinder was holding them as upon a consignment from plaintiffs. The defendants claimed the goods as purchasers from Carinder in good faith and without notice. That was one of the issues upon the trial as to which the evidence was conflicting, and it should have been submitted to the jury in that instruction.

It is essential to the right of recovery in trover, that the plaintiff had the right to an immediate possession of the goods at the time of the conversion. *Eisendrath v. Knauer*, 64 Ill. 396; *Calwell v. Corwin*, 9 Yerg. 199; *Burton v. Tunnehill*, 6 Blackf. 470; *Redman v. Gould*, 7 Blackf. 361; *Lewis v. Mobley*, 4 Dev. & B. 323; 1 Chit. Pl. 151; 2 Greenl. Ev. Sec. 636.

The instruction under consideration wholly fails to embody any proposition of that kind. It was radically defective; and there being a conflict of evidence upon the question of notice to the defendants, the judgment must be reversed and the cause sent back for trial.

Reversed and remanded.

HIDE & LEATHER NATIONAL BANK ET AL.

V.

JACOB REHM, ASSIGNEE.

Assignment—Confession of Judgment—Validity of—Jurisdiction—Appeals from County Court.

1. Upon appeal from a decretal order of the County Court in the matter of an assignment, this court holds that the evidence sustains the finding of the court below that the insolvent had formed the determination and was preparing to make the assignment when he gave the notes and warrants of attorney on which judgments were confessed.

2. An appeal lies to this court from the County Court.

[Opinion filed August 8, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. RICH & STONE, for the Hide and Leather National Bank and Charles F. Grey, appellants.

Mr. H. H. ANDERSON, for Edward Moll, appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

Messrs. WILE & REED, WASHBURN & BOWMAN and BUTZ & ESCHENBURG, for various creditors.

Mr. ADOLPH MOSES filed a brief in opposition to the motion to dismiss the appeal.

MCALLISTER, J. This is an appeal from the decretal order of the County Court in the matter of the assignment of J. W. Weber, under the act concerning voluntary assignments, declaring the several judgments against said Weber, January 13, 1887, upon notes and warrants of attorney of that date, and the execution liens thereunder, to be unlawful preferences and as such restraining their enforcement.

It appears that said notes were respectively given for *bona fide*, but unmatured indebtedness from Weber to the several parties appellant; that the several judgments were entered up about five o'clock of the afternoon of that day and the executions issued thereon were respectively levied upon all the property of Weber about six o'clock the same evening; and on the morning of the next day the assignment in question from Weber to Rehm was executed and recorded.

Certain of the unpreferred creditors of Weber filed their petition in the County Court alleging that Weber, before and at the time of giving said judgment notes, had determined and formed the purpose of making a disposition of all his property and an assignment, and that he had such assignment in contemplation; that he carried such purpose into effect by making such assignment on the day following that of giving said notes and warrants of attorney; wherefore the same constituted a part of said assignment and unlawful preferences in favor of appellants. That presented the principal issue; but, as incident thereto, it was also an issue whether Weber was, at the time in question, insolvent and knew it. Upon the hearing on pleadings and proofs much evidence was introduced, the witnesses, including Weber, being examined as such in the presence of the court. The court found for the petitioners upon all the issues involved and made the order appealed from.

Upon this appeal, aside from an objection that the court erred in admitting testimony against appellants' objection tending to prove such insolvency and knowledge on the part of Weber, the only contention on behalf of appellants is, that the finding of the court that Weber contemplated making an assignment before and at the time of making said notes and

warrants of attorney, was against the preponderance of the evidence. We have examined and duly considered all the evidence and are brought to the conclusion that the finding of the court is supported by the evidence; that there is such a chain of facts and circumstances welded by the evidence as to leave no reasonable doubt in the mind of an impartial investigator that Weber had formed the determination and was preparing the way to making such assignment before he gave the appellants the notes in question. The case is entirely distinguishable in its facts from that of *Field v. Geohegan*, 14 West. Rep. 387.

It would be a task, as useless as onerous, to undertake to state and discuss the evidence in this voluminous record. We think the order should be affirmed.

A motion was made to dismiss the appeal on the ground that an appeal from the County Court to this court is unauthorized by the statute. We are of opinion that, under the statutes as they now are, such appeal is authorized, but shall not waste time by setting out and analyzing such statutes.

Order affirmed.

CHARLES F. KENDALL

v.

CHARLES F. YOUNG.

Sales—Invoice—Evidence of Cost—Rescission—Instruction.

1. A contract for the sale of a stock of goods, "to be invoiced at cost and as agreed upon," does not justify a rescission because of the failure of the vendor to produce the original bills of certain of the goods on demand.

2. In the case presented, an instruction to the effect that it was the duty of the vendor on the request of the vendee to furnish such evidence of cost as merchants in the same line of business usually have, was erroneous.

[Opinion filed August 8, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Kendall v. Young.

This suit was brought by Young against Kendall to recover \$1,000 paid the latter on a contract in writing, dated November 15, 1885, by the terms of which appellant was to sell to appellee a stock of goods and fixtures then in a store at Topeka, Kansas, and in the words of the contract the same "to be invoiced at cost and as agreed upon (see estimate on show cases, stools, safe, stove, mirrors, viz., \$747.09)," for which appellee was to pay partly in cash and the balance in lands in Michigan. The parties began to invoice the stock shortly after the contract was executed. When the invoice had been partly made, based on the marks on the goods, a dispute arose as to the cost price of certain cotton bats upon which there were no marks. Kendall said the cost price was 13½ cents per pound. Young testified that he demanded the original invoices and Kendall refused to produce them, saying there would be a great deal of trouble if he had to hunt through a bushel basket of papers, and that they might as well make a stand there; that he (Young) would have to take them at that; that thereupon he (Young) told him that until the bill was presented to him, he would not go any further with the invoice, and he then quit; that he told Kendall he would not go on until he was satisfied that the bats cost 13½ cents.

Kendall testified that he told Young he had destroyed all his bills; that when he came to the bats he called off a number of pounds at 13½ cents; that Young said they did not cost 13½ cents, and asked if he (Kendall) had the bills; that he told him he had his previous September invoice, and when that was shown to Young he said, "that's all right; I'm done," and walked out of the store.

The fourth instruction given by the court on behalf of plaintiff was as follows:

"4. The court further instructs the jury that under the written contract in evidence in this cause the plaintiff was not bound to accept as final the statement of the defendant as to the cost of the merchandise mentioned in the contract in evidence, but it was the duty of the defendant, on the request of the plaintiff, to furnish him with such evidence as merchants in the line of business of the defendant usually have of the cost

of the merchandise as would be reasonable under the circumstances, as shown by the evidence in this case, unless you believe from the evidence in this case that the plaintiff and defendant agreed that some method specified should be pursued in ascertaining the cost, and if such a method was agreed upon, then that method was to be followed."

To which the defendant excepted. Verdict for plaintiff for \$1,149.49. Motion for new trial by defendant. Motion overruled and exception by defendant. Judgment on verdict. Defendant appeals, and assigns as error the giving of said fourth instruction.

Mr. E. A. OTIS, for appellant.

Messrs. ABBOTT & BAKER, for appellee.

GARNETT, J. The contract between appellant and appellee provided no method of ascertaining the cost of any part of the stock of goods. The phrase, "and as agreed upon," clearly refers to the estimate of \$747.09 for show cases, etc., and nothing else. The appellee denies that any verbal agreement was made as to the manner of ascertaining the cost. When the dispute arose between them as to the cost of the cotton bats, Young insisted that he would go no further unless the original bills were produced, and as they were not produced he at once left the store, saying he was done. He could not arbitrarily rescind the contract. The failure to specify in the agreement any particular mode of fixing upon the cost, did not warrant him in saying he would have the bills or abandon the trade. If he was entitled to any evidence of cost, certainly he could not demand that which was not in the power of Kendall to furnish. There was an implied undertaking on Kendall's part to produce such evidence in his power as is usual between merchants in ascertaining the cost price of a stock of goods, and such as he could produce without unreasonable labor or delay, and his refusal to produce the same as to any substantial part of the goods, on request of Young, would have amounted to a breach of the contract on his part; but Young had no right to elect the character of evidence that would satisfy him and

 Stelzich v. Weidel.

refuse to proceed unless it was presented. If he wanted the benefit of a condition like that he should have had it inserted in the contract. He was a man of large experience in handling the goods he proposed to purchase, and may have intended to rely on his experience to save him from any overreaching in fixing the cost price. Whatever inference may be drawn from his failure to require such a stipulation, it is plain that the contract did not save to him the privilege of rescinding unless the original bills were produced. That he demanded, and that alone, he gave Kendall to understand, would satisfy him. He did not even request the production of any other evidence. The fourth instruction given by the plaintiff correctly told the jury that the plaintiff was not bound to accept as final the statement of the defendant as to the cost of the merchandise, but it erroneously told them that it was the duty of the defendant, on the request of the plaintiff, to furnish him with such evidence as merchants in the line of business of the defendant usually have of the cost of merchandise, or to furnish such other evidence of the cost as would be reasonable under the circumstances, as shown by the evidence, unless they believed that some method specified had been agreed on.

There was no proof to show what evidence such merchants usually have of cost prices, or what evidence of cost would have been reasonable under the circumstances.

The instruction was erroneous and the judgment of the court below is, for that reason, reversed and remanded.

Reversed and remanded.

 JOHN STELZICH

V.

JACOB WEIDEL ET AL.

Trust Deed—Equitable Assignment—Foreclosure—Defect of Parties—Practice—Estoppel.

1. The delivery, without a written assignment, of an agreement and trust deed to a third person who has paid the sum secured thereby, at the

request of the grantor in the deed, constitutes such third person the equitable assignee thereof and entitles him to maintain a bill for foreclosure.

2. A bill should not be dismissed for want of equity, where there is merely a defect of parties.

3. In the case presented, it is *held*: That the court below should have directed an amendment to the bill so as to make others, who made advances, parties complainant, and the assignor of the agreement and trust deed a party defendant; that the bill should have contained an allegation that the complainant had elected to declare the whole amount secured by the trust deed due; and that the court below improperly dismissed the bill for want of equity.

[Opinion filed August 8, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. JONES & LUSK, for plaintiff in error.

Messrs. WILLIAM VOCKE and H. STORCK, for Frank J. Miller, defendant in error.

MORAN, P. J. On September 20, 1880, Jacob Weidel borrowed from the Bohemian American Building, Loan and Homestead Association, the sum of \$2,600, and gave to said association an agreement in and by which he promised to pay \$6.50 every week, until said principal sum, together with 8 per cent. interest per annum thereon, should be paid.

As security for the performance by him of said agreement, he executed a trust deed on certain real estate situated in Cook County to one Albert Silha, which trust deed was duly recorded in the recorder's office in Chicago. Weidel made the weekly payment required by the agreement until he had reduced the amount owing to the association to \$1,600, when, in February, 1884, he applied to one Belohradsky, who was at the time secretary of the said building and loan association, for a loan of \$2,000, with part of which he desired to pay off the \$1,600 due to the association. Belohradsky procured said Weidel to execute a judgment note for \$2,000, and to secure it by a trust deed upon the same property on which the agreement to the association was secured, and, after deducting certain

costs and fees, gave to Weidel about \$154, and promised to pay to the association the \$1,600, but, instead of doing so, sold the note and trust deed to one Wittner and let the money due the association stand. Afterward the amount so due was reduced by payments made by Weidel and Belohradsky to the sum of \$805. Then Weidel made an agreement with John Stelzich, the appellant, to pay to the association the said balance of \$805 due on the agreement, as he could not pay it himself and the association threatened to foreclose under the trust deed. Stelzich and Weidel went to the meeting of the association and Stelzich paid then \$400, and afterward the balance due, at Weidel's request.

This agreement between Stelzich and Weidel was submitted to the society at the meeting, and when the whole amount was paid by Stelzich the association gave the mortgage to him at the request of Weidel. Weidel subsequently sold the real estate described in the trust deed to Frank J. Mueller, one of the appellees, subject to all liens, and Mueller refusing to pay to Stelzich the amount due to him upon the agreement turned over to him by the society, Stelzich filed his bill in the Superior Court to foreclose the trust deed given to Silha to secure the said agreement, and made Weidel and his wife, and Wittner, Mueller and one Podolsky parties defendant. Albert Silha was made party defendant by amendment but was not served. On the hearing the foregoing facts being shown by complainant's evidence and being wholly uncontroverted, appellant's bill was dismissed for want of equity.

To sustain the decree it is urged on the part of appellee, Mueller, that it is not shown by the evidence that the agreement with the association was turned over to Stelzich, and that the delivery to him of the trust deed would not amount to assignment of the debt. The record shows that the trust deed and agreement were offered in evidence by the complainant, and in connection with the introduction of them in evidence Stelzich testified that he was the owner of them. It is true that in one part of the evidence he states that the mortgage was given to him by the association when he had paid the money due on the agreement, but we think it clear

that by the term "mortgage" he intended to include both the trust deed and the agreement, for in the same connection he states Weidel's request to the association that the papers should be given to him (Stelzich). Our conclusion on that point is, that the agreement, as well as the trust deed, was delivered to Stelzich by the association at Weidel's request when the sum of \$805 had been paid by Stelzich, but that there was no written assignment of the agreement.

By the transaction Stelzich became the equitable assignee of the agreement, and, though it was necessary that the building and loan association should be made a party defendant to the bill to foreclose, yet the fact that it was not a party would not authorize the court to dismiss the bill for want of equity. The court should have directed the amendment of the bill in that respect.

It is further contended, that the evidence tends to show that the wife and son of Stelzich have an interest in the subject-matter, as they appear to have furnished some of the money paid by Stelzich to the association. We are inclined to think that the wife and son of Stelzich should be joined with him as parties complainant to the bill, but the failure so to join them would not, under the evidence in the case, authorize the dismissal of the bill, for it clearly appears that Stelzich has an interest to assert which would authorize his filing the bill. The court should have directed the amendment of the bill so as to have brought in the wife and son of Stelzich either as complainants or as defendants, and if the rule to amend the bill was not complied with, then the court could dismiss the bill for failure to comply with the order to amend, but not for want of equity.

It is also urged that it is not shown that the whole indebtedness under the agreement had become due, as it is not shown that the building association had exercised the option to declare it due. The trust deed provides, "that if default is made in the payments of said agreement, or any part thereof, then, and in such case, the whole of said principal sum and interest secured by the said agreement shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable," etc. There is no allegation in

the bill that pursuant to the provisions of the agreement, complainant had elected to consider the whole amount due, and while no notice prior to the filing of the bill is necessary, yet the bill should contain such a declaration. *Harper v. Ely*, 56 Ill. 179; *Johnson v. Van Velsor*, 43 Mich. 208.

As Stelzich is the equitable assignee of the agreement, he may exercise the option in the same way as the original holder thereof might do. *Harper v. Ely*, *supra*.

But like the other defects in the bill, this one did not authorize its dismissal for want of equity, for there was clearly a considerable amount due and in arrear under the terms of the agreement, and the court could have granted a foreclosure for such amount as was due at the time the decree was entered. *Johnson v. Van Velsor*, *supra*.

It appears to have been contended in the court below that Stelzich was estopped from proceeding to foreclose this trust deed against the appellee, Mueller, on account of a certain statement made by Stelzich to Mueller's attorney before Mueller purchased the property, and which statement was taken down in writing by said attorney.

It is not contended in this court that any such estoppel arises, and an inspection of the statement, as it is set forth in the record, shows that, so far from its estopping Stelzich by anything contained in it from setting up his claim against the real estate, the statement gave to Mueller and his attorney the most explicit notice of Stelzich's right in the premises. This statement alone, if taken as true without further evidence, would establish complainant's right to relief as against Mueller.

On the merits of the case we think the equity is plainly with the appellant, but as the new parties who must be brought in will have the right to offer evidence as to their particular interests, we will not direct a decree.

The decree of the Superior Court will be reversed and the case remanded to that court, with directions to that court to require the bill to be amended in the particulars specified, and all the new parties served, including Silha, and when the said matter shall reach an issue, to let the cause be heard according to the practice of the court.

Reversed and remanded.

THE HAMBURG AMERICAN PACKET COMPANY

VS.

REGINA GATTMAN.

Carriers—Failure to Deliver Goods—Action for Damages—Liability—Termination of—Seizure by Customs Officers—Damages—Whether Excessive.

In an action against a steamship company to recover damages for the failure of the defendant to carry a certain box of goods from Hamburg to New York and deliver the same to the plaintiff, it is *held*: That it was the duty of the defendant to deliver the goods at New York to the plaintiff; that its liability as a common carrier continued for a reasonable time to enable the plaintiff to claim and take possession of her goods; that there was no want of diligence on her part; that upon the defendant's theory of the facts the seizure by the customs officers resulted from the wrongful act of a mere intruder before the termination of the defendant's liability as a common carrier; that this court can not set aside the verdict as excessive, the evidence being conflicting and two juries having reached substantially the same result.

[Opinion filed December 14, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

MESSRS. MOSES & NEWMAN, for appellant.

MESSRS. BYAM, PARKHURST & WEINSCHENK, for appellee.

BAILEY, J. This was an action on the case, brought by Regina Gattman against the Hamburg American Packet Company, to recover damages for the failure of said company to carry a certain box of goods belonging to the plaintiff from Hamburg, Germany, to the City of New York, and deliver the same to the plaintiff at New York, whereby said goods became lost to the plaintiff. The declaration consists of four counts, three of which allege the delivery of said goods by the plaintiff to the defendant to be carried and delivered

Hamburg Am. Packet Co. v. Gattman.

as aforesaid for certain reward, the failure of the defendant to so carry and deliver the same, and the consequent loss of said goods, the other count being an ordinary count in trover. The trial before the court and a jury resulted in a verdict in favor of the plaintiff for \$1,604.30, and for that sum and costs the plaintiff had judgment.

In the early part of February, 1883, the plaintiff, being about to emigrate from Buda Pesth, Hungary, her former place of residence, to the United States, packed such goods as she desired to take with her in nine boxes, numbering them consecutively from 1 to 9, and forwarded to the defendant at Hamburg to be shipped to New York. The plaintiff arrived at Hamburg and sailed February 14, 1883, as a steerage passenger on the defendant's steamship *Wieland*, bound for New York. But four of her boxes, viz., those numbered from 1 to 4, arrived at Hamburg in time to be shipped by the *Wieland*, the other five being shipped a few days later by the defendant's steamship *Hammonia*. All of said boxes arrived in New York and were there ultimately delivered to the plaintiff except box number 1.

The plaintiff was accompanied by her daughter Clara Phillipsborn and two children, her son Henry and two other young women, all of whom came with her from Buda Pesth. It appears that the *Wieland* landed at Hoboken, and that the steerage passengers, including the plaintiff and her party, together with their baggage and effects, were there placed on a steam barge and taken over to Castle Garden, New York. The plaintiff was met at Hoboken by Maximillian Phillipsborn, her son-in-law, who, as it seems, had immigrated to the United States two or three years previously. Phillipsborn went on board the steamship as it reached the wharf, and after assisting the plaintiff in getting together her hand-baggage, undertook to search for her boxes. The evidence shows that he searched both on shipboard and among the baggage landed at Hoboken but failed to find them. He then inquired of one of the defendant's employes in attendance, who suggested that possibly the boxes would come by another ship, but assured him that they would be all right and would soon be along, and that the

plaintiff would get them. On reaching Castle Garden he again inquired of the defendant's agent and received substantially the same response. The next day he went to the defendant's freight office in New York and inquired for and described the boxes and was again met by the same assurance that they would come all right. Upon his insisting that he could not afford the expense of remaining in New York to await their arrival and that he must have them at once, he was referred to another party to whom he again gave an explanation of the matter and who told him to go back to Hoboken, assuring him that he would find the boxes there. He accordingly returned to Hoboken and applied to the defendant's freight agent and was directed by him to look all around and see whether he could find them. He thereupon made thorough search, but the search proving fruitless, he was told to go again to Castle Garden as his boxes might be there. He then returned to Castle Garden and made a thorough search there but with like result. He then went to the defendant's office and demanded the boxes of the defendant's manager, telling him that he could not remain longer in New York, and that he wished to take the boxes with him on his journey to Chicago; that he had a given number of railroad tickets for the party, upon each of which he was entitled to free transportation of 150 pounds of baggage. The manager then told him that if they would go west by the Erie railroad, he would ship the boxes later by that road, and arrange for their transportation the same as though taken along with the party, but as Phillipsborn had already procured tickets by the Pennsylvania railroad, this arrangement could not be made. The party, however, remained in New York another day, and on that day Phillipsborn again made search and inquiry for the boxes both at Hoboken and at Castle Garden, but entirely failed to get any trace of them. The plaintiff thereupon left an order for their delivery, when found, to Rothfield, Stern & Company of New York, and came on with her party to Chicago. Subsequently three of the four boxes shipped by the Wieland and the five boxes shipped by the Hammonia were delivered by the defendant to Rothfield, Stern & Co. and were forwarded by them to her. Box number 1 was never delivered.

There is considerable conflict in the evidence in relation to the marks or directions placed by the plaintiff on the missing box before it was shipped, the defendant's evidence tending to show that it was marked and directed to a Mr. Rothgerber of Chicago, and that the plaintiff's name was not on it, while the plaintiff and several of her witnesses testified that all her boxes were marked with the name of Regina Gattman, in care of Rothgerber, Chicago, before they were shipped from Hamburg.

The defendant gave evidence showing that, by the rules and usages of the custom-house, the baggage of the steerage passengers arriving at New York was examined by the custom-house officers on the deck of the ship or at the wharf; that it was the duty of the passengers claiming the baggage to open it and allow an officer to examine it, and if nothing dutiable was found in it, it was taken to the general baggage room of the commissioners of emigration at Castle Garden for registration, and then delivered to the owner; that whenever dutiable articles were found, the inspector making the examination marked the packages containing such articles and attached thereto checks labeled "U. S. Customs," and bearing numbers, at the same time giving duplicate checks to the owner, and sent the packages to the bureau of customs at Castle Garden for the determination and collection of the duties; that if the owner, for any reason, declined or neglected to open the baggage, or if no owner appeared, the baggage was seized and sent to the bureau of customs, and when no owner presented himself to receive the duplicate check, both the check and duplicate were attached to the baggage; that such baggage was under the control of the surveyor of the port from the time of its examination on deck or at the wharf to the time of its delivery at said bureau, and that it there passed into the charge and under the control of the officers of the custom-house, and so remained until it was determined who was entitled to it and the duty was paid or it was released from duty and that the steamship company had no further control over it, and had no right to interfere, unless acting as the representative of the owner and by his authority. Unclaimed immigrants' baggage was placed in a public store-room connected

with said bureau, and was there kept in charge of the custom-house officers for at least one year, and the packages were then opened and the contents appraised by said officers, who afterward disposed of them by sale at public auction.

The defendant gave evidence tending to show that all the baggage on board the *Wieland* was discharged on the day of her arrival; that after the passengers had left, one of the defendant's agents, whose duty it was to look after "left baggage," found three boxes on the dock marked Rothgerber, but having no mark or number indicating that they belonged to the plaintiff, and put them into the baggage room and locked them up, and that said boxes appeared at the time to have been opened. The defendant also gave evidence tending to show that, while the baggage discharged from the *Wieland* was being examined, an emigrant runner named Baschkopf called the attention of one of the inspectors making the examination to two boxes lying on the wharf, and endeavored to bribe him to pass them without examination, and on being asked who owned them, said that they belonged "to a girl over there;" that the inspector declined the proffered bribe and told Baschkopf to open the boxes, and upon his neglecting to do so, the inspector marked them "P. S." (meaning public stores), with the number of his badge, and, after attaching a brass check to each, put them on the barge and conveyed them to Castle Garden and delivered them to the superintendent of the bureau of customs. Whether the duplicate checks were also attached to said boxes does not clearly appear. The number on the check attached to one of said boxes was 23, and it appears by the entries made at the time in a book kept by said bureau, that the box bearing that check was marked Rothgerber, and that the number 287 was placed on it by the revenue officers on its arrival at said bureau, that being its serial number in the order of its arrival. The evidence tends to show that said box was then placed in a store-room or ware-house connected with said bureau, to which no person had access except the revenue officers, and that it was kept there for over a year; that the various packages of unclaimed goods which had remained in said warehouse for that length of time were then opened, catalogued and appraised by said officers, and that one of the

packages appearing on said catalogue was described as being marked with the name of Rothgerber; that two days prior to the day fixed for the sale of the unclaimed goods, said boxes and contents were placed on exhibition under the custody and guard of said officers, and that on the day appointed said boxes were sold, one Lee becoming the purchaser of the box marked Rothgerber. During the pendency of this suit the defendant traced said box into the hands of said Lee, and thereupon obtained from him a box, in a mutilated condition, which, as he claimed, is the box in question, and also the contents or a portion of the contents of said box. The box and contents were produced at the trial, and while a portion of the contents were admitted by the plaintiff to be her goods, she denied that the residue belonged to her, and her evidence tended to show that the box produced was not the box number 1, in which she shipped her goods from Hamburg.

The legal duty of the defendant as a common carrier of goods was to carry the goods in question from Hamburg to New York and there deliver them to the plaintiff. It seems to be the general rule that common carriers are under obligation to make personal delivery to the consignee. Schouler on Bailments and Carriers, 504. This rule is relaxed in case of carriers by water, since it is customary for them to carry merely from port to port or from wharf to wharf and for the owner or consignee to receive the goods at the wharf upon the arrival of the vessel, and it is accordingly held that a delivery upon the wharf is sufficient. But it is of the essence of the rule that due and reasonable notice should be given to the owner or consignee, so as to afford him a fair opportunity for providing suitable means to take care of and carry away the goods. Angell on Carriers, Sec. 313, and authorities cited. See also Crawford v. Clark, 15 Ill. 561; Union S. S. Co. v. Knapp, 73 Ill. 506. It clearly follows from this rule that the liability of the carrier continues until a reasonable opportunity is given the owner or consignee to receive and take possession of the goods.

We are of the opinion that the circumstances of the present case relieved the defendant from the duty of notifying the plaintiff of the arrival of her goods. She was a passenger by

the same steamship by which she had shipped the goods, and she must of course be charged with notice of the arrival of both the vessel and cargo. But although the plaintiff knew that her goods had arrived, she was entitled to a reasonable time to claim and take possession of them, and, until that time had elapsed, the defendant's liability as common carrier continued, and such liability imposed upon the defendant the duty of protecting the goods from the interference of intruders or persons not entitled to their possession.

There seems to have been no want of diligence on the plaintiff's part in endeavoring to find and take possession of her goods. Phillipsborn testifies, and in this respect his evidence is uncontradicted, that very soon after the arrival of the vessel at Hoboken, he, as the plaintiff's agent, made search for her goods both on shipboard and among all the goods on the wharf. He also inquired for them of one of the defendant's employes there present, but failed to find them. Where they were at the time this search was made does not clearly appear. That they were not then in such place on the wharf that the plaintiff or her agent could find them by the use of reasonable diligence may be fairly inferred.

If we should assume the truthfulness and accuracy of the evidence by which the defendant attempts to account for the missing box, it would appear that Baschkopf, a person with whom the plaintiff is not shown to have been in any way connected, and who must, therefore, be deemed to have been a mere intruder, took possession of said box and another box with which the plaintiff had no concern, claiming to be acting on behalf of some person whose identity is not proved, and attempted to bribe the revenue officer to pass said boxes—that is, to mark them as having been found on examination to contain no articles subject to duty, and that said officer, assuming that he was the proper representative of the owner, asked him to open the boxes, and upon his refusal seized them and delivered them to the officers of the custom house. From the time of the seizure, as must be admitted, the box was in the possession of the revenue officers of the government and the defendant had no further control over it.

The jury may very probably have inferred that the seizure took place before Phillipsborn, in his search, reached the place where the defendant had deposited the box on discharging it from the vessel, for otherwise he most likely would have found it. But, however this may be, it is clear that the seizure resulted from the wrongful act of a mere intruder, and the evidence warrants the conclusion that it took place before the plaintiff had a reasonable opportunity to find and take possession of the box, and, therefore, before the defendant's liability as a common carrier terminated. The fact that the power of the government officers to make the seizure was plenary, and was a power which the defendant could neither question nor resist, is not material so long as the exercise of that power was evoked by the wrongful act of an intruder against whom the defendant was bound by its duty as a common carrier to protect the property. It is not claimed that the box contained any articles subject to duty, nor does it appear that any duties were ever imposed upon them by the custom house officers. It may therefore be presumed that if the box had come into the possession of the plaintiff or her agent, it would have been properly submitted to the inspection of the revenue officers, and that it would have been by them discharged from the payment of duties and returned to the possession of the plaintiff. We are of the opinion then, that, even upon the defendant's theory of the facts, there was never a legal delivery of the box by the defendant to the plaintiff, and accordingly that the defendant is liable to the plaintiff for its value.

But it is by no means established that the account given by the defendant's witnesses of the seizure and subsequent history of the box is a true one. Their evidence traces the box which was seized into the hands of Lee, a purchaser at a sale by the revenue officers of unclaimed baggage, and the box thus purchased, or so much of it as had not been destroyed, was produced at the trial. The evidence offered by the defendant as to the identity of the box produced with the one lost by the plaintiff is far from being conclusive, while the testimony of the plaintiff and her witnesses tends to show that it was not the plaintiff's box. If the box purchased by Lee was not the one lost by the

plaintiff, very grave doubt is thrown upon the entire chain of evidence by which the defendant attempts to trace the history of the box from the time of its disappearance to the time of the sale of unclaimed baggage.

The point is made and very strenuously urged that the damages awarded by the jury are excessive. The evidence as to the amount and value of the goods contained in the missing box is conflicting. The plaintiff testified as to their amount, description and value, and her testimony, if believed, is sufficient to warrant the damages recovered. Her evidence is corroborated by that of her son and one of the young women who came to this country with her, who testified that they saw her pack the box, and that the articles to which she testified were put in it. She is also corroborated in some measure by her son-in-law, Phillipsborn, who testified that he knew of her being the owner of most of the goods which she claims to have put into the box. On the other hand, but a small portion of said goods, and those the least valuable, were found among the goods which, according to Lee's testimony, were in the box bought by him at the sale of unclaimed baggage. Various other circumstances appear in evidence, but which it would serve no useful purpose for us to specify in detail, which tend to throw discredit upon the plaintiff's evidence as to the damages. After carefully considering all the evidence, however, and after taking into account the ordinary disposition of plaintiffs in cases of this character to magnify the amount of their loss, we are unable to say that the jury have misconstrued the evidence, or that they have given undue weight to the evidence introduced by the plaintiff. The case has been tried once before with substantially the same result as to damages, and after the concurring verdict of two juries upon evidence thus conflicting, this court should be very reluctant to set aside the verdict as being against the preponderance of the evidence.

Various exceptions were taken by the defendant to the ruling of the court in the instructions to the jury. We have examined the instructions and are of the opinion that they stated the law with substantial accuracy, and that there was no material error in that respect.

Hamburg Am. Packet Co. v. Gattman.

We find none of the assignments of error sustained, and the judgment will, therefore, be affirmed.

Judgment affirmed.

UPON REHEARING.

[Opinion filed August 1, 1888.]

Per Curiam. A rehearing having been granted in this case, we have carefully reviewed the evidence and the instructions of the court to the jury in all the light shed upon both by the very earnest and able oral and printed arguments delivered and presented by the appellant's counsel.

The instructions, it seems to us, directed the jury with all reasonable accuracy and precision as to every point in issue upon the trial. Those refused were erroneous.

The evidence on behalf of the plaintiff below tended to prove every necessary element of a cause of action, and to support the verdict even as to the amount of damages.

There was, it is true, a conflict of evidence as to some of the facts essential to a recovery, and as to the question of damages. But the record fails to show a case where the verdict is wholly unsupported by evidence as to any one essential fact, or where it is manifestly against the weight and preponderance of the evidence, or where the verdict is apparently the result of passion or prejudice upon the part of the jury, some one of which is necessary in order to justify this court in granting a new trial within the established rules governing in such cases.

After two examinations of the evidence in this case, we are satisfied it shows a cause of action against the defendant below as a common carrier. The defendant received a case of plaintiff's goods at Hamburg to be carried to the port of New York, and there safely delivered to the defendant; at that port upon the arrival of the ship carrying the goods, the plaintiff caused a seasonable and proper demand to be made upon the defendant for the goods, and the defendant failed to deliver them or inform plaintiff where they were. They were lost. That made out a cause of action and the defendant failed to show

any legal justification in the premises. We may suspect that the evidence was strained so as to enlarge quantity and magnify as to quality and value of the goods, but we can not, under the evidence, demonstrate that what we suspect is fact. Upon the opinion heretofore delivered by Mr. Justice Bailey, it is the judgment of a majority of the court, that the judgment below should be affirmed.

Judgment affirmed.

JOSEPH J. HUNTER

V.

JAMES MATHEWSON ET AL.

Factor's Lien—Advances—Waiver—Notice—Sales—Question for Jury—Evidence—Symbolical Delivery—Instructions.

1. A factor who has made advances in the same line of business to the consignor, is entitled to a lien on stock consigned to him, unless a sufficient reason to the contrary is shown.

2. In the case presented it is *held*: That the question whether a certain transaction between the consignor and the plaintiffs, who were third parties, amounted to a sale, was for the jury; that the question whether the consignee, the defendant herein, was a *bona fide* purchaser, was not involved; that evidence tending to show an agreement between the consignor and consignee, prior to the shipment, for the payment of said advances out of the proceeds, is competent; that, in order to lay the proper foundation for an implied waiver by the defendant, it was necessary that the evidence should tend to show that he had notice of the plaintiffs' interest in the cattle, or proceeds; and that certain of the instructions were erroneous.

3. Where a sale is actually intended, and is made in the usual course of business, an invoice, or other instrument, which specifies and enumerates the property sold, may be substituted for a bill of lading in constituting a symbolical delivery.

4. A factor, in enforcing his lien, occupies in no sense the position of a purchaser.

5. It is improper for the court, in giving instructions, to pass upon the facts of the case.

[Opinion filed August 8, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Hunter v. Mathewson.

This was an action upon the common counts for money had and received, brought by appellees, Mathewson and Haidle, who were engaged in farming and stock business at Stanton, Nebraska, against appellant Hunter, who was engaged as a live stock commission merchant at the Union Stock Yards, Chicago, to recover the sum of \$1,311.69, as part of the proceeds of certain live stock shipped May 2, 1885, by one C. Abrams, by rail, from Stanton aforesaid, to said Hunter, as such commission merchant, to be sold by him.

This case was tried by jury, under the plea of general issue, and evidence was given on behalf of the plaintiffs tending to show that May 1, 1885, at Stanton aforesaid, they sold the cattle in question to said Abrams, he paying therefor \$300 in cash, and at the same time giving to them for the balance of the price a draft on defendant Hunter, payable to the order of plaintiffs, for \$5,166, which they indorsed to the Citizens Bank at Stanton for collection. The evidence tended to show that the cattle were delivered by plaintiffs to Abrams, and that the latter delivered them at Stanton aforesaid to the railroad company for shipment to said Union Stock Yards, said railroad company giving him a receipt and contract therefor, made in duplicates, a copy of one of which, indorsed by Abrams, was delivered to plaintiffs, to which said draft was attached. It was as follows:

“LIVE STOCK CONTRACT.

“Copy of duplicates issued at request of shipper.

“FREIGHT OFFICE TREMONT, ELKHORN & MISSOURI VALLEY R. R. Co.

“STANTON, NEB., May 2, '85.

“Received of C. Abrams 5 cars cattle, to be delivered at U. S. Yards, Chicago, Ill., at special rates, being tariff rates for cattle or hogs. In consideration of which, and for other valuable considerations, it is hereby mutually agreed that said company shall not be liable for loss by jumping from the cars, delay of trains not caused by negligence, or any damage said prop-

No. of way bills.	Nos. of cars.	No. of animals in each car.
3	2467	18
4	17375	17
5	2213	17
6	2607	18
7	3591	18

erty may sustain except such as may result from a collision of the train with other trains, or when the cars are thrown from the track in course of transportation, and in this case the company, upon whose road the accident, loss or damage shall occur, shall be liable therefor, and no suit shall be brought or claim made against any other company forming a part of the route, for such loss or damage (it being expressly understood and agreed that the responsibility of this railway company shall cease upon delivery of said property to its connecting line, unless otherwise agreed to in writing, and signed by the respective parties hereto), and that the rules and regulations printed above are an essential part of this contract.

"C. E. WILBUR, *Agent*.

"C. ABRAMS, *Owner*."

On the back of the above paper is the following:

"Parties actually in charge of and accompanying within named stock are required to write their own name in ink here.

"C. ABRAMS.

"Parties in charge have written their own names above.

"C. E. WILBUR, *Agent*,

"Stanton, Neb."

"NOTE: Agents will permit only the signature of owners or *bona fide* employees, who accompany the stock, to be entered on back of contract, without regard to passes allowed by number of cars, and run a pen through remaining lines.

"NOTE: Agents will in all cases send to the general freight agent, Missouri Valley, a duplicate of all live stock contracts made by them. The duplicate must be signed by the owner in the same way as the original."

The plaintiffs delivered this copy with said draft attached to said bank for collection.

The evidence tended to show that the railroad company made out a way bill of the cattle, showing said Abrams to be the consignor and the said defendant the consignee thereof, in which the name of plaintiffs did not appear; that said Abrams came with the cattle in his charge to the Union Stock Yards, where he assisted in putting them into defendant's possession

to be sold by him ; and the evidence tended to show that the defendant had no notice of said draft, of plaintiff's claim, or of any of the transactions between the latter and Abrams until he had sold the cattle and received the proceeds of them.

The defendant having shown that Abrams was indebted to him in the sum of \$1,311.69, for advances by the former as such commission merchant, made in former transactions, to said Abrams as shipper of stock, offered to show that a little prior to the shipment of the stock in question it was agreed between them that defendant should have his pay out of the proceeds of the next shipment made. But the court, on objection of plaintiff's counsel, decided that such evidence was immaterial and incompetent and excluded the same ; to which defendant duly excepted.

There was evidence on behalf of plaintiffs tending to show that the transactions between the plaintiffs and Abrams at Stanton respecting the live stock contract and draft, were in accordance with the usual course and forms of the business ; but as to that the evidence was conflicting.

The evidence tended to show that the cattle arrived at the Stock Yards in the morning of May 6, 1885, were immediately delivered to defendant and sold by him, as commission merchant, before noon of that day ; that defendant appropriated sufficient of the proceeds to pay Abrams' indebtedness to him, and, although notified of said draft after the sale, he refused to pay anything upon it, but paid the balance over to Abrams, who paid it to the plaintiffs. The controversy was, therefore, confined to the amount so retained by defendant. The court gave, on behalf of plaintiffs, the following instructions:

“INSTRUCTIONS FOR PLAINTIFFS.

“This is an action of assumpsit by which the plaintiffs seek to recover the sum of \$1,311.69, being the balance of the net proceeds of the sale by defendant of certain cattle at the Union Stock Yard, near this city, on the 6th day of May, 1885.

“It appears by the evidence that shortly prior to the 2d day of May, 1885, the plaintiffs sold to one Abrams a lot of cattle at Stanton, Nebraska.

"Thereafter on the 2d day of May, 1885, said cattle were shipped by said Abrams in his own name to defendant at the Stock Yards. He paid plaintiffs on account of the price of these cattle the sum of \$300, and to provide for the balance of the price, gave them a draft on the defendant for the sum of \$5,166, and also what is styled a copy of the duplicate bill of lading or live stock contract which has been introduced in evidence.

"The court charges you that the effect of this arrangement as between Abrams and Mathewson and Haidle, the plaintiffs, was to vest in them an interest in, or right to the proceeds of those cattle to the extent of this draft. Whether or not they have this right as against the defendant, depends upon other considerations which will be hereafter adverted to.

"It appears that Abrams accompanied the cattle to the Stock Yards where they arrived on the morning of May 6th, about 5:30 o'clock, and were shortly thereafter delivered to the defendant, and sold by him as a commission man in the usual course of business in the forenoon of that day, the net proceeds, deducting commissions and usual charges, being \$5,116.50, which were passed to the credit of Abrams on defendant's books.

"It also appears that at this time Abrams was indebted to the defendant in the sum of \$1,311.69, a balance which had arisen mainly by reason of his overdrafts on previous shipments. This balance defendant, claiming a previous agreement on his part warranting this, deducted from the proceeds of the sale of the cattle, and, on the 7th of May following, mailed him a draft for the balance of \$3,804.81, which he turned over to the plaintiffs. Now, the question for you to try is whether, on the evidence, the defendant is a *bona fide* purchaser of the cattle shipped to him as shown in evidence to the extent of his demand against Abrams. That is, whether by any agreement or arrangement with Abrams, he acquired an interest in these cattle or their proceeds without knowledge of the fact that he was not entitled to such proceeds, or knowledge or notice of such facts or circumstances as, if brought to the attention of men of ordinary prudence similarly situated

and followed up with ordinary care or diligence, would have led to that knowledge.

"Therefore, unless you find from the evidence that defendant believed and was, under all the circumstances, justified in believing that the cattle were the property of Abrams or that he had a right to the proceeds thereof, and also unless you find that he attempted to vest in defendant an interest in these cattle, claiming them as his own, your verdict will be for the plaintiffs for the said sum of \$1,311.69 with interest thereon from the 6th of May, 1885, at the rate of six per cent. per annum.

"If you find from the evidence that when the cattle arrived and were sold he urged defendant to pay the draft and protested against his deducting his indebtedness to him from the proceeds of the cattle, then the defense fails in both points."

No other instructions were given. The jury found for plaintiffs assessing their damages at \$1,463.93, and the court, overruling defendant's motion for a new trial, gave judgment on the verdict, and the defendant appealed to this court.

Mr. EDWARD R. SWETT, for appellant.

Messrs. FLOWER, REMY & HOLSTEIN, and HARRISON MUGRAVE, for appellees.

McALLISTER, J. Abrams being indebted to defendant Hunter upon a general balance for advances made by the latter to the former in the same line of business, Hunter would, if no sufficient reason to the contrary were shown, have been entitled to a lien on the cattle in question for such advances, when taken into his possession with the assent of Abrams, to be sold by Hunter as such commission merchant, and upon the proceeds of the cattle, the moment they were received. 1 Jones on Liens, Secs. 418, 468, and cases in notes.

The plaintiffs, in order to establish their right to said proceeds and defeat said lien, gave evidence tending to show that they sold and delivered the cattle to Abrams; that he paid

them of the purchase price \$300 in money and for the balance gave his draft on the defendant, set out in the statement of the case, then delivered to them a copy of one of the duplicates of the live stock contract which the railroad company and Abrams had entered into, indorsed in blank by the latter, but in which the plaintiffs are in no wise mentioned.

The case seems to have been tried partially upon the theory that the transaction amounted to a sale and symbolical or constructive delivery of the cattle by Abrams to the plaintiffs below, and had the effect of passing to the latter the absolute title to the cattle, and partially upon the theory that the plaintiffs had acquired only such interest in the cattle or proceeds as would prevail over the defendant's lien, by showing notice to him of their rights, and an implied waiver on his part of his lien.

In order to lay the proper foundation for an implied waiver on the part of defendant it was necessary that the evidence as to facts and circumstances tended to show that the defendant had notice of plaintiffs' interest in the cattle or the proceeds, before, or at the time of taking possession of them for the purpose of selling them. We think the case of *Darlington v. Chamberlain*, 20 Ill. App. 443, and all the authorities there cited sustain that view.

The counsel for appellant seems to suppose that unless the railroad company issued to Abrams what is known as, or equivalent to, a bill of lading, in which the name of the consignee is mentioned, there could be no such absolute sale and symbolical or constructive delivery of the property as would give plaintiffs priority over defendant without actual notice to him. A bill of lading, or its equivalent, is not indispensable. If a sale was actually intended and made in the usual course of business, an invoice or other instrument which specifies and enumerates the property sold, may be substituted for a bill of lading in constituting a symbolical delivery. *Gibson v. Stevens*, 8 How. 384; *Davis v. Bradley*, 24 Vt. 55; *Gardner v. Howland*, 2 Pick. 599; *Davis v. Bradley*, 28 Vt. 118; *Holbrook v. Wight*, 24 Wend. 168.

The question whether or not the transaction between Abrams

and the plaintiffs was a sale, was a question for the jury, involving the fact of intention of the parties, and whether it was in accordance with the usual course of business, as to which there was a conflict of evidence. The transfer of the live stock contract did not pass the title by its unaided operation, and could operate only as evidence of a sale and a symbolical transfer of possession. Smith's Lead. Cas., Vol. 1, Part 2, p. 1206, Lickbarrow v. Mason.

It was for the jury to look at all the circumstances and to determine the character of the transaction. Holbrook v. Wight, *supra*. But as appears by the instructions for plaintiffs, set out in our statement of the case, the court took all those questions from the jury, as was done with nearly all the questions of fact in the case, and decided for itself the character and effect of the transaction, with no facts whatever submitted to the jury as the basis of that conclusion.

In the sixth paragraph of the said instructions the court directed the jury that the question for them to try was whether, on the evidence, the defendant was a *bona fide* purchaser of the cattle shipped to him as shown in evidence, to the extent of his demand against Abrams.

No such question was in issue upon the trial. A factor enforcing his lien stands in no sense in the position of a purchaser. Such a direction was calculated to mislead and confuse the jury.

The last paragraph seems to be independent of all others, and reads thus: "If you find from the evidence that when the cattle arrived and were sold, he (Abrams) urged defendant to pay the draft and protested against his deducting his indebtedness to him from the proceeds of the cattle, then the defense fails in both points."

Unless it be the law that the principal may defeat the factor's lien after it has attached, by his arbitrary directions to pay the proceeds to somebody else, that instruction was erroneous. We are aware of no such rule of law.

The practice of giving instructions in which the court assumes to pass upon the facts of the case, is not sanctioned, but condemned by the Supreme Court in repeated instances. Rail-

Vol. 27.]

Wright v. C. & N. W. Ry. Co.

road Co. v. Moranda, 108 Ill. 576; Town of Evans v. Dickey, 117 Ill. 291.

We are of opinion that in one aspect of the case the evidence offered by the defendants to the effect that prior to shipping the cattle in question it was agreed between Abrams and defendants that defendants might be paid their advances out of the proceeds, would become material. It was therefore competent. For the errors pointed out, the judgment of the court below must be reversed and the cause remanded.

Reversed and remanded.

A. J. WRIGHT ET AL.

V.

CHICAGO & NORTH WESTERN RAILWAY COMPANY.

Torts—Fire—Keeping of Oils—Ordinance—Violation of—Storage—Questions for Jury—Evidence—Proximate Cause—Pleading—Variance—Practice—Former Adjudication.

1. Upon a second trial, after a general reversal, even if the opinion of this court could be considered, its application to part of the case as a former adjudication would have to be clearly made out.

2. Where the declaration charges that an explosion which caused the destruction of the plaintiffs' property, came from petroleum stored in the defendant's warehouse running along the easterly line of plaintiffs' building, and the evidence introduced by the plaintiffs shows that the defendant's warehouse was south of their building, the variance is fatal.

3. An ordinance making it unlawful to store or keep for sale within the city limits any crude petroleum, or to keep any quantity of crude petroleum or refined carbon oil, exceeding one barrel, in any part of a building except the cellar, is violated by a railroad company in keeping in its warehouse for a reasonable time such articles for transportation.

4. The keeping of explosives unsafely guarded in such quantities as to be dangerous to persons and property, in such a place and under such circumstances as to threaten calamity to the persons and property of others, the consequence being an explosion which causes damage to the person or property of another, gives a right of action for such damages as would not have happened in the absence of such explosives.

5. Where a number of causes and results intervene between the first wrongful cause and the final injurious consequence, which are such as might,

with reasonable diligence, have been foreseen, the last as well as every intermediate result is to be considered as the proximate result of the first wrongful cause.

6. In the case presented, it is *held*: That it was a question for the jury whether the damage alleged was the proximate consequence of the act of the defendant in keeping the oils in its building; that evidence tending to prove that the floor of the defendant's building was soaked with oil was improperly excluded; and that the court erred in excluding the plaintiffs' evidence from the jury and in directing a verdict for the defendant.

[Opinion filed August 8, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

This case was formerly before this court, and the judgment of the court below reversed and remanded, because there was error in sustaining a demurrer to the 10th count of the plaintiffs' declaration. The decision in that case is reported in 7 Ill. App. 438. On the redocketing of the case in the court below the demurrer to that count was overruled. The case again came on for trial before the Circuit Court and a jury, on the 1st, 2d, 3d, 10th and 12th counts of the declaration and pleas thereto. The 1st and 2d counts allege, in substance, that the plaintiffs were the owners and in possession of a valuable building in Chicago, having therein divers goods and chattels; that defendant occupied and used an old one-story frame building, separated from plaintiffs' building by an alley thirty feet wide, running along the easterly line thereof, which defendant used as a warehouse or storage house for freight; that on, to wit, October 9, 1871, the defendant caused to be stored in said frame building a large quantity of crude petroleum, gasoline, etc., which storage was dangerous to plaintiffs' building and contrary to law; that on October 9, 1871, defendant's building took fire and said liquid exploded with great violence, throwing great quantities of burning material upon plaintiffs' building, which was thereby destroyed, as well as the goods and chattels therein contained. The 3d count states the ownership and occupation of the buildings and their relative situation in the same manner; and that defendant took

so little and such bad care of its building that through its negligence highly dangerous and inflammable material was stored therein; and on the 9th of October, 1871, in consequence thereof, an explosion occurred with great violence and with like results as stated in the 1st and 2d counts. The substance of the 10th count is stated in 7 Ill. App. 438.

The 12th count charges the negligent keeping of said inflammable and dangerous liquids on the defendant's close for an unnecessarily and unreasonably long time, and that on October 9, 1871, the same took fire and the flames therefrom spread so rapidly to the premises, goods and chattels of plaintiffs that the same were wholly destroyed; that but for the rapidity with which the flames spread the premises and goods and chattels of the plaintiffs would not have been destroyed.

When the plaintiffs' evidence was closed a motion was made by the defendant to exclude the evidence from the jury, and instruct them to find for the defendant. The motion was sustained and the plaintiffs excepted. Verdict was rendered for the defendant and the plaintiffs filed their motion for a new trial, alleging as grounds thereof (among others) that the court erred in excluding proper evidence offered on behalf of the plaintiffs, and in excluding from the jury all the evidence introduced on behalf of the plaintiffs, and in instructing the jury to find for the defendant. The motion for a new trial was overruled, to which the plaintiffs excepted. Judgment was entered on the verdict and plaintiffs appealed.

MESSRS. GEORGE BERRY, JOHN V. LEMOYNE and LEONARD SWETT, for appellants.

The defendant is responsible for the natural and probable consequences of its unlawful or negligent acts.

The maxim, "*Causa proxima et not remota spectatur*," has given rise to much discussion and some irreconcilable decisions. This has been caused mainly by attempts to apply the maxim to a class of cases where it is not applicable, that is, to willful or negligent torts. Broom's Legal Maxims (7th Ed.) 217; Redfield in 13 Am. L. Reg., N. S. 14; Field on Dam-

ages, Secs. 9-13; McDonald v. Snelling, 96 Mass. 290; Weick v. Lander, 75 Ill. 93; Kellogg v. C. & N. W. Ry. 26 Wis. 258, 286.

The loss of the plaintiffs' goods was the natural and probable consequence of the defendant's wrongful acts. The intervention between the wrongful cause and the injurious consequence of the act of a third person does not prevent the consequence being a natural and probable consequence of the wrongful act. McDonald v. Snelling, 96 Mass. 290-6; Wood's Mayne on Damages, *60; Sheridan v. Brooklyn R. R., 36 N. Y. 39; Griggs v. Fleckenstein, 14 Minn. 81; McMahon v. Davidson, 12 Minn. 373; Weick v. Lander, 75 Ill. 93; Scott v. Shepard, 2 Black. 892 (Squib case); Illidge v. Goodwin, 5 C. & P. 92; Lynch v. Nurdin, 1 Q. B. 29.

The expression, "The natural and probable consequences," has been paraphrased substantially thus: Those consequences, and those only, are deemed natural and probable, which a person of average sense and knowledge would be expected to foresee as likely to follow. This, however, is not an exact statement of the meaning of the phrase; it is not necessary that the consequence should have been so certain to result that a person of ordinary sense and knowledge could have foreseen that it would result or that it would probably result; it is sufficient if the consequence is so natural and probable that an ordinary person would see that it was liable to result, that is, that it might follow. C. & A. R. R. v. Pennell, 110 Ill. 448; Smith v. R. R., L. R. 6 C. P. 20, 21, 23.

As illustrating generally the meaning of this phrase in cases of this kind, see Scott v. Shepard, 2 Black. 892 (Squib case); Illidge v. Goodwin, 5 C. & P. 192; Lynch v. Nurdin, 1 Q. B. 29; Clark v. Chambers, 3 Q. B. D. 327; Parry v. Smith, 6 C. P. D. 327; Thomas v. Winchester, 6 N. Y. 397; Vandeburg v. Truax, 4 Den. 464; B. & A. R. R. v. Shanly, 107 Mass. 568.

The plaintiffs had in their building twenty-four horses harnessed and bridled, which they were removing as fast as possible, and which, with the number of men working, would have been all taken out in eight minutes. There was no fire in the

plaintiffs' building, but the defendant's building on the other side of the alley was burning. Suddenly by an explosion in the defendant's building, the doors and windows of the plaintiffs' building were burst in and it was filled with smoke and flame; the men were compelled to leave the horses to save their own lives. The explosives were kept in the defendant's building, unlawfully and negligently.

"It should have been left for the jury to determine whether, from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved at the trial, the defendant was chargeable with maintaining a private nuisance," or a public nuisance, or was guilty of negligence, and whether the damages sustained by the plaintiffs were the natural and probable consequences of the defendant's wrongful acts. *Heeg v. Licht*, 80 N. Y. 581; *T. P. & W. R. R. v. Pinder*, 53 Ill. 421; *Fent v. T. P. & W. R. R.*, 59 Ill. 362.

Messrs. B. C. COOK, W. C. GOUDY and W. B. KEEP, for appellee.

The evidence was uncontroverted that the defendant's building was a depot for receiving and shipping freight. That this was a warehouse for the storage of goods was not only not proven, but was abundantly disproven. There was no evidence tending in any way to prove it. The words warehouse and storing-house for freight have a fixed and settled meaning. Receiving goods for present transportation is one thing, and receiving them as a warehouseman for storing is quite another. Articles received by a railroad company are required by law to be immediately forwarded. The railroad company becomes an insurer of the goods as soon as received. Nothing but the act of God, or of the public enemy, will excuse the carrier if the goods are lost or destroyed. If the goods are received for storage, the care required is only that which an ordinarily prudent man takes of his own goods.

The storing of inflammable goods is far more dangerous than the receiving them for shipment. Goods received by a carrier for transportation must be constantly under the eye of a watchman. The responsibility of the carrier is so great as

to absolutely require this. Goods stored in a warehouse need not be constantly watched, consequently the risk is far greater in the one case than in the other. It is no great inconvenience to keep goods on store in the manner pointed out in the ordinance. But to put every barrel of petroleum in a cellar when received for shipment, and take it out when shipped, would involve great expense in handling. The law does not allow so much for transporting this oil as it does for molasses, for instance. The law provides specific rates of freight for the transportation of carbon oils. These rates are fixed, and published by the railroad commissioners of the State, and prescribe rates from Chicago to every station on defendant's road, and the law compels defendant to ship such oil at the rates prescribed from every station at those rates. (Revised Statute, 810, Sec. 59.) If the defendant was bound to put every barrel so received in a cellar, and take it out, it is manifest that the cost of transporting a car-load of this oil would be double the cost of transporting a car-load of molasses.

The distinction of keeping in store and for other purposes is uniformly taken by the courts. *Ins. Co. v. Langdon*, 6 Wend. 628; *O'Neil v. B. F. Ins. Co.*, 3 N. Y. 127; *Hynes v. Ins. Co.*, 17 Barb. 119.

A railroad becomes a warehouseman when goods are received at the point of destination and stored. *P., C. & St. L. R. R. Co. v. Hollowell*, *American Law Register*, Feb., 1880; *Rothschild v. M. C. R. R. Co.*, 69 Ill. 164; *Merchants' D. & F. Co. v. Halleck*, 64 Ill. 284; *Ill. Cent. R. R. Co. v. Friend*, 64 Ill. 303.

"In order to make a defendant liable, his negligence must be the *causa causans*," and not merely a *causa sine qua non*; per Kelly, C. B., in *The Lord's Bailiffs of Bomney v. The Corporation of Trinity House*, 39 L. J. Ex. 163.

The defendant was a railroad corporation and a common carrier, and bound by the laws covering common carriers.

It is bound to receive all freight offered at any of its stations, and transport the same. It did receive certain barrels of carbon oil in its freight depot. Some of those oils remained

from Friday to Sunday, the day of the fire, but the most of them were received on Saturday, and in the regular course of business would have gone out on Monday morning. On Monday, the 9th of October, 1871, the whole city of Chicago was destroyed by a tornado of fire.

The fact that the injury is a remote result of the act, or in other words, that the injury would not have occurred except for the act, is not enough if some cause other intervened which is the proximate cause of the injury. *Wood's Mayne on Damages*, p. 69, note.

A distinction is taken by all the courts between a case where the injury is the direct result of the act of defendant, as if the oil had exploded or ignited in the freight house of defendant and thereby caused the burning of the plaintiffs' property, and a case where some other cause has intervened which is the cause of the injury, like the great fire. *Toledo, Wabash & Western R. R. Co. v. Muthersbaugh*, 71 Ill. 573; *Phillips v. Dickerson*, 85 Ill. 11; *Dubuque Wood and Coal Association v. City and County of Dubuque*, 30 Iowa, 183; *Daniels v. Balentyne*, 23 Ohio St. 532; *R. R. Co. v. Kellogg*, 94 U. S. 475; *Hoag v. Lake Shore & M. S. R. R. Co.*, 85 Pa. St. 293; *Waters v. The Merchants' Louisville Ins. Co.*, 2 Curtis, 406; *Atchison, Topeka & Santa Fe R. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Nashville & C. R. R. Co. v. David*, 19 Am. Rep. 594; *Ryan v. N. Y. Central R. R.*, 35 N. Y. 214; *R. R. Co. v. Kerr*, 12 P. F. Smith, 353.

Where the accident has arisen in consequence of some unexpected and unusual condition of things which could not have been foreseen, no liability will attach; as, where a railway was impaired by an extraordinary flood, the state of the road being such that it was secure against ordinary floods, in which case it was held that the company were not liable for an injury to a passenger from a misplacement of rails occasioned by such flood. *Withers v. The North Kent Ry. Co.*, 27 L. J. Ex. 417.

So where an act of parliament directed a water company to lay down pipes with plugs in them as safety-valves to prevent the bursting of the pipes, and the plugs were properly made and of proper material, and a severe frost occurring, the plugs

were prevented from acting and the pipes accordingly burst and flooded the plaintiff's cellar, it was held that there was no evidence of negligence against the defendants. *Blyth v. The Birmingham Water Co.*, 11 Ex. 781.

GARNETT, J. On the first trial of this cause in the court below the evidence of the plaintiffs was excluded from the jury, and a verdict for defendant found by instruction of the court. In considering this action of the court, we said in our former opinion that the court was divided in opinion as to the question whether it was error to give such peremptory instruction on the evidence introduced. The defendant now insists that, as there was no new evidence on the second trial, the insufficiency of the evidence to support the 1st, 2d, 3d and 12th counts is *res adjudicata*. The record shows a general reversal and remanding for error. The opinion, even if it were proper to refer to it, does not show how the court was divided on the question referred to. For all that appears in the record or opinion, two of the judges may have thought the ruling erroneous and the third may have dissented. If there is an adjudication we must be able to make it out clearly. It is not sufficient that it may be argumentatively inferred. 1 Herman on Estoppel & Res Adjudicata, Sec. 116.

That which is given the effect of a former adjudication in this court, should operate in like manner in the Supreme Court. The doctrine of that court is, that the opinion of the Appellate Court is no part of the record. *Christy v. Stafford*, 123 Ill. 464.

But whether we consider the former opinion of this court or not, an adjudication of the question under consideration is not shown.

The evidence did not tend to support the first three counts. They charged that the explosion which caused the destruction of plaintiffs' property came from petroleum, etc., stored in defendant's warehouse, running along the *easterly* line of plaintiffs' building, while all the evidence introduced on the point showed that defendant's warehouse where the oil was stored, and from whence the explosion is alleged to have pro-

ceeded, was *south* of the plaintiffs' building. That is a fatal variance. 1 Chitty's Pl. (16th Am. Ed.) 407; The Central Military Tract R. R. Co. v. Rockafellow, 17 Ill. 541; Disbrow v. C. & N. W. R. R. Co., 70 Ill. 247; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; C. & A. R. R. Co. v. Mock, Adm'r, 72 Ill. 141; T. W. & W. Ry. Co. v. Morgan, 72 Ill. 155.

The tenth count relies upon a breach of the city ordinance, but counsel for appellee is mistaken in supposing that it alleges the oil was kept in front of defendant's premises or building. The decision of this court reported in 7 Ill. App. 438, held that the tenth count set forth a good cause of action, but did not decide that receiving the oil merely for transportation, and keeping the same for a reasonable time for that purpose, was a violation of the ordinance. The latter question we are now called upon to decide.

The evidence showed that all the articles which are alleged to have caused the damage complained of, came into possession of the defendant, and were kept in its building simply for the purpose of transportation. Whether the ordinance applies to such a keeping or storing, must depend on its terms and the object sought to be accomplished. The first clause of the ordinance makes it unlawful to *store or keep for sale* within the city any crude petroleum, etc., exceeding a quantity of five barrels of forty-five gallons each; the second, to *keep for sale or on storage* any refined carbon oil, etc., except such as will stand a fire test of 110 degrees Fahrenheit, etc.; the third, to *keep* any quantity of said articles exceeding one barrel of forty-five gallons in any part of a building excepting a cellar, etc.; the fourth, to *keep or store* any crude petroleum, etc., in front of any building or on any street, alley, wharf, lot or sidewalk, for a longer time than is sufficient to receive in store, or in delivering the same, provided such time shall not exceed six hours.

The third clause seems plainly to prohibit the *keeping* by any person or corporation of more than one barrel, except in a proper place, to wit, a cellar. There is no exception in the ordinance in favor of a railroad company keeping the articles for purposes of transportation. Why should the court intro-

duce such an exception? The oils enumerated are just as dangerous to life and property when in possession of a railroad whose business is to remove it from the city, as in the hands of the shipper.

The fourth clause would seem to indicate that, in using the words *store* and *storage*, the common council did not intend to confine the ordinance to keeping in store for hire. Streets, alleys, lots and sidewalks are not commonly used for storage purposes. If appellee's construction is correct, any quantity of the prohibited articles might be *kept* in an open lot in the city if it was not kept there for sale, and the keeper received no compensation for the keeping. The design of the ordinance was to guard life and property against the dangers incident to the accumulation of large quantities of these inflammable substances in any one place. To permit railroad companies to ignore the ordinance, and take into their freight houses indefinite quantities of such articles, would amount to a practical denial of the protection intended.

The danger is the same whether the keeping is paid for or not, and whether it is kept for sale, exhibition, refining purposes or for hire. To obey this ordinance is, without doubt, an inconvenience to any one not provided with a cellar such as its terms require. Railroads may not be able to comply with the prescribed terms, and make any profit on transporting the oils specified, unless the rates allowed are made more liberal. It may become necessary for the roads to build expensive warehouses within the city limits to insure the safety sought by the ordinance, or to remove the oil from the city as rapidly as delivered, to its warehouses outside of the city. But all these matters are trifles compared to the safety of the public and can have no weight in determining this important question.

The mere act of keeping the oils in its building, although prohibited by the ordinance, gives no right of action to appellants. It is still a question of fact whether the damage alleged was the proximate consequence of such keeping. While, therefore, we decide that the third clause of the ordinance means what it says, and is applicable to all persons and

corporations, yet it will be a question for the jury whether the keeping of the oils was or was not the proximate cause of the injury complained of in the tenth count.

The twelfth count charges upon the appellee negligence in keeping the oil in its warehouse for an unreasonable time. If the defendant could keep in that warehouse any quantity of such oils, no matter how large, and for any period of time, no matter how long, without incurring the imputation of neglect in thus exposing to danger and loss the adjoining property of other persons, it is our duty to say that the evidence did not tend to support the twelfth count. On the other hand, if there was a limit as to quantity and time, it is plainly our duty to leave the jury to find the limit. The evidence tended to show that the oils in the defendant's warehouse at the time of the fire, or a large part of them, had been there from Friday, October 6, to Sunday night, October 8, 1871, awaiting shipment; that they were of a highly inflammable character, exploding with great force at a comparatively low temperature; that the explosion and fire which caused and hastened the destruction of the plaintiffs' property came from the oils, and that, but for this unexpected precipitation of fire upon the plaintiffs' property before there was reason to anticipate its immediate destruction, a large part at least of the personal property could and would have been removed from all danger.

Whether the oils were kept for an unreasonable time depends on the quantity and character of the articles, their liability to cause damages like that complained of, the degree of exposure to explosion of the articles in the place they were kept, the character and condition of the defendant's building, its proximity to the property injured, and upon the force or feebleness of these circumstances the jury should have been allowed to pass.

It is true that one is only answerable for the probable and proximate consequences of a fault and which may be foreseen by ordinary forecast. This rule does not shield defendant. If the evidence is to be believed, the explosion of the oils was a probable and proximate consequence of having them in that inflammable frame building through whose cracks the sparks

falling from any passing locomotive might, at any time, have started a fire.

The danger might have been foreseen by any person of average intelligence. But, to make the defendant liable in damages, it is not necessary that the great fire itself might have been foreseen, nor that the defendant should have anticipated the loss from that particular source; if the circumstances were such that it should reasonably have been aware of the danger from the sparks of an engine, the burning of any other building or structure in that vicinity, or carelessness of any person, this court can not say, as a matter of law, that the oils were not kept an unreasonable time.

This case is distinguishable from Toledo, W. & W. R. R. Co. v. Muthersbaugh, 71 Ill. 573, where the court said: "Had it not been for the high wind prevailing from the southeast, it needs no argument to show the stable would have been in no danger whatever." From the facts in this case, however, we think the jury would have the right to find that appellants, property was in danger all the time defendant used its warehouse for storing explosive oils; not in danger especially from a great conflagration which no one anticipated or could foresee but from any fire which might, through accident, carelessness or design, come in contact with the explosives. The case of A. T. & S. Fe. R. R. Co. v. Stanford, 12 Kan. 354, well states the doctrine applicable to the facts in the case at bar:

"Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, *and if they are such as might, with reasonable diligence, have been foreseen*, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, *which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer*, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action."

The words in italics point out the correct distinction; by reasonable diligence, or by the exercise of reasonable intelligence, a great tempest of fire could not have been foreseen, but fire and explosion could and would have been apprehended.

The law requires a man to guard against all dangers that are to be reasonably anticipated; it is a class of dangers that is to be guarded against, and he is not excused because any particular danger within the class could not be foretold. We are content with the rule that the keeping of explosives unsafely guarded, in such quantities as to be dangerous to persons and property, near a frequented street, or other public place, or in the vicinity of the residences or places of business of others, under circumstances that threaten calamity to the person or property of others, the consequences thereof being an explosion of such articles, which causes damage to the person or property of another, gives the latter a right of action to recover from the person keeping the explosives such damages as would not have happened in their absence. *Meyers v. Malcolm*, 6 Hill, 292; *Cooley on Torts*, 607.

One guilty of negligence in leaving anything dangerous in a place where he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, is liable in damages if that injury shall be so brought about. *Weick v. Lander*, 75 Ill. 93; *Lynch v. Nurdin*, 41 E. C. L. 422.

It follows from what we have said that the court should have permitted the plaintiffs to prove, as they offered to do at the trial, the condition of the defendant's building and the floor thereof, as to its being soaked with oil or otherwise.

For this and the other errors herein indicated the judgment of the court below is reversed and remanded.

Reversed and remanded.

Gibbons v. County of Cook.

JOHN GIBBONS
v.
THE COUNTY OF COOK.

Attorney's Fees—Actions against County.

In an action against a county to recover compensation for services rendered as special counsel, this court holds, upon the agreed statement, that the employment of the plaintiff was binding upon the defendant.

[Opinion filed September 6, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. ARMAND F. TEEFY and WM. W. GURLEY, for appellant.

Mr. E. R. BLISS, for appellee.

Per Curiam. This was *assumpsit* by appellant, Gibbons, against the appellee, the County of Cook, to recover compensation for services rendered as special counsel by the former for and upon the retainer and employment of the latter. The declaration was upon the common counts, with an affidavit of the plaintiff of the amount due him for such services, which was stated to be the sum of \$809. The plea was the general issue.

Upon an agreed statement of facts, which provided, in substance, that if the court should be of opinion upon such statement that the defendant was legally liable to the plaintiff, then judgment in his favor was to be rendered for the amount claimed by the plaintiff in his affidavit of the amount due, the cause was submitted to the court for trial without a jury, resulting in a finding and judgment for defendant, and the plaintiff appealed to this court, where the case is submitted upon printed arguments.

We have read the arguments of the counsel for the respective parties, examined and duly considered all the matters of

fact presented in and by the agreed case, and from the agreed facts and the fair and legitimate inferences to be drawn therefrom, we are of opinion that the party suing was the person intended to be employed as special counsel on behalf of defendant; that the employment of plaintiff as such counsel in the manner stated in the agreed case was legitimate and binding upon the defendant; that the plaintiff performed the services under such employment, for which the defendant is legally liable to pay him.

The judgment of the court below will, therefore, be reversed and the cause remanded, with directions to that court to render judgment in favor of the plaintiff for the amount stated in said affidavit of the sum due to the plaintiff as damages, besides costs.

Reversed and remanded.

ISAIAH V. WILLIAMSON ET AL.

V.

ISAAC STONE AND JULIA A. STONE.

Trust Deeds—Sale under Power—Validity—Bill to Redeem—Laches.

Upon a bill to redeem from a sale under a power in a trust deed, it is held: That the sale was of a character wholly unauthorized by the power; that it merely amounted to a private sale, though public in form; that the right of complainant to redeem existed in full force when the bill was filed; and that the doctrine of *laches* has no application.

[Opinion filed September 6, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

MR. MELVILLE W. FULLER, for appellants.

MR. W. C. GOUDY, for appellees.

McALLISTER, J. This case was before us at a former term of this court, upon appeal from the decretal order of the Circuit Court, denying the motion of the complainants to amend their bill as originally filed; in an essential particular, and dismissing the same for want of equity. On that occasion this court reversed said decree and remanded the cause with directions to permit the amendment. *Stone v. Williamson*, 17 Ill. App. 175, where may be found a statement of the case, which need not be repeated here.

Upon the cause going back to the lower court the proposed amendment of the bill was made, and the defendant made further answer setting up, amongst other things, the defense of *laches* on the part of complainants, to which the latter filed a replication.

Additional evidence was adduced and the case coming on to be heard upon pleadings and proofs, a decree passed allowing the complainants to redeem the premises from the trust deed in question by paying to Williamson all that was justly due him for principal and interest. From that decree he brings this present appeal, and his counsel, besides controverting certain allegations of the complainants below, seems to rely chiefly upon the ground of *laches*, because the alleged foreclosure by sale under the power took place December 22, 1878, and this bill to redeem was not filed until August 11, 1883. The rights of no third parties have intervened.

It seems to us clear, upon principal and reason, that if the sale in question was null, either because the power had become extinct, or because the sale, as made, was of a character wholly unauthorized by the instrument conferring a power of sale, the right of appellees to redeem must be regarded as existing in full force, and the doctrine of *laches* has no application. *Bergen v. Bennet*, 1 Cal. Cas. 15. The power had not become extinct; but in the light in which we view it, the alleged sale was of a character wholly unauthorized by the power under which it was made. That power authorized only a sale at public auction. Where an agent is authorized to sell real estate at public auction, and he sells at private sale, the sale is void. *Daniel v. Adams*, 1 Amb. 495; *Ewell's Evans on Ag.*, marg. p. 122.

It appears from the evidence that the alleged sale was made in this way: On the day of the sale, but before it took place, Phelps, the trustee, without any authority from Williamson, express or implied, decided upon the price at which the property should be sold, and fixed it at \$9,000; he also procured the attendance of an attorney at law who had been, and was then, acting as his own attorney, and suggested to him to bid for the premises on behalf of Williamson, the mortgagee or beneficiary under the trust deed, said sum of \$9,000. No other bidders were present; the attorney bid the sum which the trustee had decided upon, and notified him to bid, and the premises were formally struck off to Williamson, to whom the trustee executed his deed.

In our opinion, whatever formalities may have been observed in other respects, there was not, in any legal sense, a sale at public auction, simply because a price was previously fixed and determined upon by the trustee, and communicated to and acted upon by the person who ostensibly acted as bidder for Williamson in his absence, and without authority from the latter, so far as the record shows; but if he had authority, then the transaction amounted to a mere private sale, and was void. In *Hibler v. Hoag*, 1 Watts & Serg. 552, the court say: "In every sort of auction there are either successive bids for the property, or successive offerings of it at different prices, in a way to provoke competition." *Crandall v. The State of Ohio*, 28 Ohio St. 479; *Campbell v. Swan*, 48 Barb. 109.

In the light of the authorities cited we are inclined to the opinion that the alleged sale was null and void, so that at the time of bringing this bill to redeem, the appellee's right of redemption existed in full force.

The evidence is voluminous and much of it immaterial, but without discussing it we feel at liberty to state that, in our opinion, there is sufficient evidence coming from the side of the defendants below, upon whom rested the burden of showing a valid sale, to justify the court below in finding it null and void.

Decree affirmed.

The People v. City of Chicago.

THE PEOPLE EX REL. JOSEPHINE B. DIX ET AL.

V.

THE CITY OF CHICAGO.

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60 626

Mandamus—Petition—What Must Appear—Discretion—Sidewalks—Ordinance—Evidence—Judicial Notice.

1. A writ of *mandamus* will not be awarded unless the petition shows on its face a clear right to have the thing sought by it done, and by the person or body sought to be coerced.
2. The court exercises a discretion in granting or refusing the writ.
3. Upon a petition for a *mandamus* to compel the city of Chicago to lower a certain sidewalk, it is *held*: That the petitioner can claim no right under an ordinance not set out in the petition; that the time when, the place where, and the body by whom the alleged ordinance was passed, with a recital of so much of it as was material, should have been stated in the petition; and that the time when the walk was built should also have been stated.
4. The courts do not take judicial notice of the Municipal Code of Chicago.

[Opinion filed September 6, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This is an appeal from the judgment of the court below sustaining a demurrer to and dismissing the petition of appellants against the appellee, the City of Chicago, for a *mandamus* to compel the latter to lower or cause to be lowered a portion of the sidewalk on the west side of Rush Street, between Illinois and Michigan Streets, in said city, down to an alleged established grade. The petition alleges that petitioners owned the real estate fronting east on said Rush Street known as numbers 28, 30, 32, 34 and 36, and one Martin McNulty owned the remainder of the lots in the block, on the same side of said street, and known as numbers 18, 20, 22, 24 and 26; that the appellee had established a grade for a sidewalk along there; that petitioners had made the sidewalk in front of

Vol. [77]

The People v. City of Chicago.

their lots conformably thereto, but that said McNulty had made one in front of his said lots which was from nine to twelve inches higher than the grade so established and that of the sidewalk of petitioners, thus making a step in the said sidewalk which was unsightly and dangerous. The petition contains no statement as to the time when, or the materials out of which said walks or either portion thereof were made; whether made of plank or boards, gravel, stone or concrete, nowhere appears; nor is any fact or circumstance other than the fact that McNulty's part was from nine to twelve inches higher stated to show that such part was a public nuisance in said street.

The petition contained the following allegations:

"Your petitioners further represent that section 1924 of the Municipal Code of the city of Chicago provides that no part or portion of any sidewalk where the grade has been established, shall be laid or re-laid at any different grade or any other level than the adjacent portions of said sidewalks, and provides for a penalty for a violation of that section; and further provides that it shall be lawful for the department of public works to alter the same so as to make the same conform to the established grade; and that the costs and expenses of so altering the same may be recovered from the owner of the premises by the said city of Chicago.

"Your petitioners further show unto your Honors that the said city of Chicago, under and by virtue of its charter and the powers vested in it by law, and through its proper officers, did establish the grade and level of said sidewalk in front of the premises aforesaid, and on the west side of Rush Street, between Michigan and Illinois Streets; and that in the establishing of such grade and the passing of the foregoing ordinance to enforce the same, the said city of Chicago has in all things acted according to law."

The petition contains a statement that the grade was established before said sidewalks were made, but none as to whether said section of the Municipal Code of the city of Chicago was passed by the common, or city council of said city when it was passed, or that it had been passed in force at the time of making any part of said sidewalk to what constituted said Municipal Code.

The People v. City of Chicago.

MESSRS. WEIGLEY, BULKLEY & GRAY, for appellants.

MR. CLARENCE A. KNIGHT, for appellee.

McALLISTER, J. It is the settled law of the Supreme Court of this State, that the writ of *mandamus* is only to be awarded in a case where the party applying for it shall show a clear right to have the thing sought by it done, and by the person or body sought to be coerced; that the petition must show on its face a clear right to the relief demanded by the relator, who must distinctly set forth all the material facts on which he relies, so that the same may be admitted or traversed. The People ex rel. v. Glann, 70 Ill. 232; The People ex rel. v. Davis, 93 Ill. 133. The court exercises a discretion in granting or refusing the writ, and if the right be doubtful it will be refused. Lavallo v. Soucy, 96 Ill. 467.

“A writ of *mandamus* will be granted against municipal corporations and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter or statute or law, and there is no specific legal remedy adequate to enforce the right of the public or the specific legal right of the relator.” Dill. Municipal Corp. (1st Ed.) Sec. 665.

It is not claimed by counsel for appellants that they were entitled to the writ of *mandamus* on the ground that the statute or charter under which the city was organized imposed upon it the duty of keeping the streets in a reasonably safe condition, and that Rush Street, at the place in question, was not, as respected the sidewalk, in such condition, by reason of the rise therein of from nine to twelve inches, but in argument they base the right to such writ upon the provisions of an ordinance.

The short answer to that contention is, that no ordinance of the city of Chicago is set out in the petition as in force at the time when the sidewalks, or either of them, in question, were made.

There is no such thing known to the laws of this State as the “Municipal Code of Chicago” mentioned in the petition,

and of which the courts can take judicial notice. Hence the alleged ordinance, like any other matter of fact, should have been set out in the petition, if any rights were to be based upon it. Dill., Sec. 346; Trustees v. Lefler, 23 Ill. 90; Harker v. Mayor, 17 Wend. 199.

The rules of pleading applicable to such a case must necessarily be analogous to those which obtain in cases where rights are predicated upon a private statute. It was indispensable that the time when, the place where, and the body by whom the alleged ordinance was passed, with a recital of so much of the ordinance as was material, should have been stated and embodied in the petition in some manner that would admit of a proper traverse by the opposite party. Gould on Pl., 3d Ed., Chap. 3, Sec. 16; 9 Bac. Abr. Statute L., p. 261.

The petition fails to show when either sidewalk was made. It may have been more than twenty years before the petition was filed. It also fails to show of what material or how they were made. The petition was clearly insufficient, and the judgment should be affirmed.

Judgment affirmed.

GEORGE SCHNEIDER ET AL.

V.

VOLUNTINE C. TURNER.

Gaming—Sec. 130, Criminal Code—Street Railway Stock—Option Contract—"Agree"—Consideration.

1. An agreement to sell a certain number of shares of the capital stock of a street railway company at a stipulated price, if taken on or before a future date, is to be regarded as a contract giving an option to buy such shares of stock at a future time. It is, therefore, within the prohibition of Sec. 130 of the Criminal Code.

2. The instrument in question, in the case presented, can not be regarded merely as a proposition which could be accepted if not withdrawn within

27	220
41	70
27	220
50	54
51	388
51	439
27	220
58	240
27	220
62	149
62	169
27	220
69	571

Schneider v. Turner.

the time limited. The word "agree" imports a consideration, and it is not competent for the plaintiffs by averment and parol evidence, to show a want of consideration.

3. When such a contract is precisely within the letter and spirit of the statute it is void, without regard to the question of intent.

[Opinion filed September 6, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit brought by appellants against appellee to recover damages for the non-performance by the latter of an alleged contract for the sale of certain shares of the stock of the North Chicago City Railway Company. The declaration originally contained eight counts; but the plaintiffs having dismissed as to all but the fifth, seventh and eighth counts, those three alone are in question. The fifth count sets out *in hæc verba*, the following instrument in writing:

CHICAGO, November 11, 1885.

"In consideration of one dollar (\$1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd. W. Peck, seventeen hundred and eighty-six (1,786) shares of the capital stock of the North Chicago City Railway at six hundred dollars (\$600) per share, if taken on or before the fifteenth day of December, 1885.

"V. C. TURNER."

Plaintiffs averred that thereafter, to wit, the 14th day of December, 1885, at, to wit, the county aforesaid, they tendered the said defendant the aggregate price of said 1,786 shares of capital stock mentioned in said writing, to wit, the sum of \$1,071,600, and said plaintiffs then and there requested said defendant to sell and deliver to said plaintiffs the aforesaid shares of stock; yet the said defendant then and there refused to deliver said shares of stock to the plaintiffs and has since hitherto refused to deliver the same, whereby, etc.

The seventh count sets out *in hæc verba* the same instrument, also a subsequent parol agreement between the parties made November 21, 1885, modifying said written contract as respects the time and manner of payment of the price mentioned in the writing, but in no other respect, and avers that thereafter, to wit, on the 12th day of December, 1885, at said county, the plaintiffs notified said defendant of their acceptance of the aforesaid agreement, and that afterward, to wit, on the 14th day of December, 1885, the said defendant notified the said plaintiffs that he would refuse to receive said amount of the purchase price for said shares, although plaintiffs were ready and willing to pay, etc., and thereby waived any tender, etc.

The eighth count of said declaration was as follows:

"And whereas also, the said defendant afterward, to wit, on the 11th day of November, 1885, at the place aforesaid, made and delivered to said plaintiffs a certain other writing, in words and figures as follows, to wit:

"CHICAGO, Nov. 11, 1885.

"In consideration of one dollar (\$1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd. W. Peck, seventeen hundred and eighty-six (1,786) shares of the capital stock of the North Chicago City Railway, at six hundred dollars (\$600) per share, if taken on or before the fifteenth day of December, 1885.

"V. C. TURNER."

"And said plaintiffs aver that said written agreement was made and signed by said defendant without any good or valuable consideration; and that said defendant did not receive, nor did said plaintiffs pay, the one dollar or the other valuable considerations mentioned in said writing; and they further aver that said plaintiffs did afterward, to wit, on the 14th day of December, 1885, tender said defendant the aggregate price aforesaid of said 1,786 shares of stock, to wit, the sum of \$1,071.600, and requested said defendant to deliver them the aforesaid shares of capital stock.

“And they further aver that at the time of said offer on the part of said defendant, and at the time of said tender on the part of said plaintiffs, said defendant was the owner of, or had the control of, and the right to contract for, the sale of said shares of stock.

“Plaintiffs further aver that said offer was made by defendant because it would probably require so much time to make examination into the condition, property and franchises of the North Chicago City Railway Company, and to ascertain the value of such property; and the time for the performance of said contract and its acceptance was not so fixed for the purpose of speculating upon the rise and fall in the value of said stock, and that there was no intention on the part of said plaintiffs, and there was no agreement or understanding between plaintiffs and defendant at that time and thereafter, that said contract should be performed by the settlement or adjustment of the difference in value between the contract price and the market price, if there should be any, of such stocks at the time fixed for such acceptance and performance. Yet the said defendant then and there refused to deliver said shares of stock to the plaintiffs, and has since hitherto refused to deliver the same, whereby plaintiffs have been deprived of divers great gains and profits which would have accrued to them from the delivery of the said shares of stock.”

The defendant demurred to each of said counts, and the demurrer was sustained to each, and, the plaintiffs electing to abide by their declaration, the court gave final judgment against them, from which they prosecute this appeal.

Messrs. SMITH & PENCE, for appellants.

A contract which does not involve in its performance the settlement thereof by an adjustment and payment of the differences between the contract price and the market value at the time of the supposed performance, is not a gambling contract *per se*, or under the statutes of this State, because it is not affected by the vice of a gaming intention. *Pickering v. Cease*, 79 Ill. 328; *Tenney v. Foote*, 4 Ill. App. 594; *Same v. Same*, 95 Ill. 99; *Pearce v. Foote*, 113 Ill. 228; *Webster v.*

Sturgess, 7 Ill. App. 560; McCormick v. Nichols, 19 Ill. App. 334; Beveridge v. Hewitt, 8 Ill. App. 467; Coffman v. Young, 20 Ill. App. 76; Bigelow v. Benedict, 70 N. Y. 202; Mortimer v. McCallan, 6 M. & W. 58; Thacker v. Hardy, L. Q. R. (4 B. Div.) 685; Kent v. Mittenberger, 13 Mo. App. 507; Whitesides v. Hunt, 97 Ind. 191.

The court will never construe a statute according to the letter, which is manifestly unjust in its operation, if it can be avoided.

This contract was made in the utmost good faith between business men in a legitimate business, without any suspicion that they were engaging in a gambling transaction, or doing anything against the morals or peace of the community.

It is clear that this court and the Supreme Court deem it necessary that such contract should of itself involve the element of gambling before the statute can be invoked; and to constitute such a gambling element an agreement or understanding must be had between the parties to the effect that stock should not be delivered, but the difference only between the contract price and the market values at times of performance should be adjusted and paid.

The construction given by this court and the Supreme Court to Sec. 130 of the Criminal Code necessarily requires an interpretation to be given to the word "option" different somewhat from the common definition of that word. In other words, it requires an ascertainment of the meaning of that word as used in the commercial world, on the stock exchange and board of trade.

This statute was passed for the purpose of meeting certain evils which had grown up on the stock exchange, and especially on the board of trade in Chicago, and the language used in the statute was in conformity with its accepted meaning on the board of trade. *Tenney v. Foote*, 4 Ill. App. 598.

In other words, the language of the statute contains the idea that the transaction against which it is leveled must involve the element of gambling, as generally understood. That is, it must be a bet upon an uncertain event and not a mere sale and transfer of stock.

The definition of gambling as given by the Supreme Court in *Merchants S. L. & T. Co. v. Goodrich*, 75 Ill. 554, is the following: "A wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event."

The contract in question does not involve any such element. If it related to real estate, no one would pretend that it involved the idea of a bet.

The evils sought to be remedied are the betting upon the price of commodities enumerated by an agreement to settle and adjust the difference without delivery of the commodities. When the commodity is to be delivered then it becomes a legitimate mercantile transaction.

The intention of the legislature was to provide punishment for crime. It is not to be presumed that it had any desire to punish innocent parties or to prohibit commercial transactions which were not *per se* against public policy. There were classes of commercial transactions well known in the community which were, in effect, nothing but gambling. The general assembly were legislating upon the question of gambling, and undoubtedly desired to cover by some appropriate provisions such gambling commercial transactions, and hence section 130 was passed. If that section means what counsel for appellees will contend, then the legislature did an absurd thing and passed a statute which "would lead to an absurd consequence," which would prohibit innocent *bona fide* commercial transactions, and which in no wise would interfere with that class of commercial transactions which this court and the Supreme Court have held to be gambling transactions and which fall within the meaning of this statute.

The contract of November 11, 1885, was without consideration, and, unless accepted, was a mere offer which might have been withdrawn at any time before acceptance, but when accepted on December 14, 1885, it became a binding contract, a promise for a promise, and the performance of it was fixed to be made on or before December 15, 1885.

In the amended eighth count, it is alleged that said sup-

posed contract was signed and accepted without any good or valuable consideration, and that plaintiff did not receive the dollar or the other valuable considerations mentioned in the instrument. The demurrer admits this. If there was no consideration, then the instrument was a mere offer not binding on the proposer until such offer was accepted, and when accepted it was a promise for a promise.

The plaintiff made tender of the contract price within the time fixed by the offer, and defendant refused to perform. Thus the transaction, both in form and substance, was a *bona fide* transaction without any element of a gambling option, or of an option such as is described in Sec. 130 of the Criminal Code.

Though one dollar and other valuable considerations are acknowledged as having been received by Turner, yet it is clear law that a receipt can always be explained or disputed, or shown to be merely colorable. 2 Chitty on Contracts (11 Am. Ed.) 1118; Bishop on Contracts, Sec. 75; 2 Wharton on Ev. Secs. 1042, 1039, 1064, 1077, 1083; 1 Greenleaf on Ev. Sec. 305; Furbush v. Goodwin, 25 N. H. 425; Huebsch v. Scheel, 81 Ill. 281; Honeyman v. Jarvis, 64 Ill. 366; Bowes v. Foster, 2 Hurl. & N. 779.

Messrs. GOUDY, GREEN & GOUDY, for appellee.

It might be admitted, for the sake of argument, that the main object of the legislature was to prevent the dealing in privileges to buy or sell, which were usually settled by the payment of differences. The question before the legislature was to make a law which would effectually break up the pernicious practice. It was well known that all manner of practices and forms were resorted to in order to evade the common law rule that such contracts were void. Therefore the legislature deemed it expedient to go to the root of the matter, and to make every contract giving the privilege to buy or sell at a future time, void. If the contract on its face came within the terms of the statute, it was bad and beyond cure; if it was valid on its face, but did not express the true contract, such real contract could be proved outside of the apparently good

contract. The language is broad and free from ambiguity, thus excluding any ground for construction.

A contract for the sale of grain or of stock, to be delivered in the future at a time to be fixed by either buyer or seller, was always valid, and was not affected by section 130; but a contract giving the privilege to make a contract for sale in the future was a different thing, and one prohibited by the statute. It is not a logical or proper conclusion to say that a contract expressly within the language of the statute is good for the want of the element which avoided such contracts. The parties can not accomplish that result, neither can the legislature. The object of this statute clearly was to take away every pretext for transactions which had become a public evil.

The court "must seek for the intention in the words of the act itself." The act says that all contracts whereby one person contracts to have or give to himself or another the option to sell or buy at a future time, etc., shall be void. The act is expressed in clear and precise terms. All such options are prohibited. The court is "not at liberty to suppose that the legislature intended anything different from what their language implies." *Commonwealth v. Kimball*, 24 Pick. 366.

The statute makes all pure options void, and the court can not inject into the statute a limitation not found therein. Therefore it follows that the contract sued on, which is admittedly an option contract, is void, and, being void, can not be made valid by extrinsic evidence.

We insist that, even if the plaintiffs were at liberty to deny the consideration mentioned in the instrument, and thus change its legal import, yet they would have no cause of action. In that case, the instrument being without consideration, would be *nudum pactum*, and unenforceable. To make a valid contract both parties must be bound. In the case supposed, Turner alone would be bound. Clearly, if there was no consideration, he was not bound when he signed the instrument. The count alleges that afterward plaintiffs tendered the price and requested a delivery of the stock, but Turner then and there refused to perform.

This case is like the celebrated case of *Cooke v. Oxley*, 3 T.

R. 653. The declaration alleged that the defendant proposed to the plaintiff that the former should sell and deliver to the latter 266 hogsheads of tobacco, whereupon the plaintiff desired the defendant to give him (plaintiff) time to agree to or dissent from the proposal until the hour of four of the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same to the plaintiff upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four of the afternoon of that day. The plaintiff averred that he had agreed to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day. He also averred that he requested defendant to deliver to him the said hogsheads, and offered to pay to the defendant the price for the same, yet the defendant refused.

A motion in arrest of judgment was sustained on the ground that there was no consideration for the defendant's promise.

In *Routledge v. Grant*, 4 Bing. 651, the same doctrine is laid down on the authority of *Cooke v. Oxley*. The case of *Adams v. Lindsell*, 1 B. & A. 681, which is sometimes said to break in upon the authority of *Cooke v. Oxley*, is referred to, and the distinction pointed out that in that case the contract was made by post.

In *Faulkner v. Hebard*, 26 Vt. 452, it was held that a contract for the sale of property, which is merely what is termed a refusal of the property by one of the parties, leaving it optional with the other party whether he will take the property within a certain time or not, unless upon some other consideration or under seal, would not be valid in law for want of a consideration, *Redfield*, Ch. J., delivering the opinion of the court. See, also, *Eskridge v. Glover*, 5 Stew. & Porter, 264; *Stitt v. Huidekoper*, 17 Wall. 384; *Johnson v. Filkington*, 39 Wis. 62; *Smith v. Weaver*, 90 Ill. 392.

Where an instrument recites a consideration it can not be shown by extrinsic evidence that there was, in fact, no consid-

eration, for the purpose of annulling the instrument or changing its legal import. *Stackpole v. Arnold*, 11 Mass. 27; *Miller v. Edgerton*, 15 Pac. Rep. 894; *Goodspeed v. Fuller*, 46 Me. 141; *Grout v. Townsend*, 2 Den. 336; *Belden v. Seymour*, 8 Conn. 304; *Jones v. Buffum*, 50 Ill. 277; *Arthur v. Arthur*, 28 N. Y. 24; *Stackpole v. Robbins*, 47 Barb. 212.

MCALLISTER, J. The ground upon which the insufficiency of the declaration was predicated was, that the instrument set out in the respective counts thereof, was an agreement, a contract, and that it was, upon its face, a contract to give the plaintiffs the option to buy, at a future time, the shares of stock therein mentioned; and that therefore it came directly within the prohibition of Sec. 130 of the Criminal Code, which reads as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10, nor more than \$1,000, or confined in the county jail not exceeding one year, or both; *and all contracts made in violation of this section, shall be considered gambling contracts and shall be void.*"

The counsel for appellants earnestly insist that the eighth count of plaintiffs' declaration is good notwithstanding said statute; because, they say, in view of the averments in that count, which are to be taken as admitted by the demurrer, there was no contract, for the want of a consideration; and hence the instrument set out is to be regarded as a mere proposition, which would not be within the statute, and not having been withdrawn, would, if accepted within the time specified, become a contract from the time of acceptance and be valid. They further claim that, at all events, the averments to the effect that there was no intention to settle upon differences, saved the transaction from the denunciation of the statute.

A demurrer admits only such facts as are well pleaded. Whether those matters were well pleaded, and whether the case falls within said section of the Criminal Code, must, as it

seems to us, depend upon the decision of the question whether the instrument set out is to be regarded as an agreement, a contract, or a mere proposition for a sale. If it did not amount to a contract, but was a mere proposition for one, then it was clearly not within said statute; for, to be within it, there must have been a contract to give to the defendant or to the plaintiffs the option to sell or buy at a future time the shares of stock mentioned. The question is not entirely free from difficulty, but we are inclined to the opinion that such instrument is to be regarded and taken as a contract giving to the plaintiffs the option to buy the shares of stock in question at a future time. It says: "In consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, *I hereby agree to sell to George Schneider, etc., seventeen hundred and eighty-six shares of, etc., at \$600 per share, if taken on or before the fifteenth day of December, 1885;*" and duly signed by the defendant.

In each count it was alleged that this instrument was made by the defendant and delivered to the plaintiffs, and we are unable to perceive that, as regards that instrument, anything is wanting to constitute an agreement, a contract. It expressly recites a consideration. It does not expressly appear that such consideration moved from the plaintiffs; but it will be understood and is implied in this, as in other cases, that it moved from the parties to whom the promise was made, as in the case of the promise itself. And there the rule is, that if a party to a contract promised payment, without saying to whom, it shall be understood that he promised payment to him from whom the consideration moved. *Morris v. Litchfield*, 14 Ill. App. 83.

In *Andrews v. Pontue*, 24 Wend. 289, the court said: "The contract will then be, 'I do hereby agree and bind myself to pay to Samuel Andrews the sum of one hundred dollars, whenever, and as soon as Sheriff street shall be opened.' Words like these standing alone, were, in Easter term, 1839, held by the Queen's Bench, in England, to import a consideration, and were received as sufficient to sustain an action upon an account stated. *Davies v. Wilkinson*, 1 Jurist, Am. Ed. by

Schneider v. Turner.

Halst. & Voorh. 372. The words were, 'I agree to pay C. D. 695 pounds,' (mentioning time and place for all except ninety-five pounds,) and adding, 'the remaining ninety-five pounds to go as a set-off, etc., on a certain debt.' The court pronounced this to be an *agreement*, not a promissory note; and held that the word *agree*, of itself imported a consideration. Lord Denman, Ch. J., said: 'I think the promise in this case conveyed by the words, "I agree to pay," imports a consideration, without doing any violence to the language.' And the three other learned judges, Littledale, Patterson and Coleridge, expressly concurred in the remark." In *Ives v. Hazard*, 4 R. I. 27, the court says: "The counsel for the respondent contend that the words of the memorandum import an offer to sell and nothing more. We think the language imports an agreement to sell. The language is, 'I agree to sell;' the consideration is expressed, and the time when possession is to be given is fixed by the memorandum."

So, in the case in hand, the words import an agreement to give to the plaintiffs the choice, privilege, or option to buy in the future the shares mentioned in the memorandum, and fixes the time within which such option was to be exercised. The word, 'agree,' was, as to its legal meaning, defined in *Spaulding v. Hallenbeck*, 30 Barb. 299. The court said: "Agrees, *ex vi termini*, means that it is the agreement of both parties, both *concurring* on the point, whether both sign or not." That definition is in consonance with that given in the leading case of *Wain v. Walters*, 5 East, 10; *Barton v. McLean*, 5 Hill, 256.

Regarding the instrument as a contract in writing, as we are inclined to think we should, then, by the rules of law established by the cases cited by appellee, it was not competent for plaintiffs by averment and oral proof, to alter or change the character and legal effect of that contract on the ground of want of consideration, or to transmute it into a mere offer or proposal. And it being, on its face, a contract precisely within the letter and spirit of the statute in question, it must suffer annihilation therefrom, without regard to the question with what intent the contract was made. It is a universal princi-

ple, that a man shall be taken to intend that which he does. Starkie on Ev., Part 4, p. 739. That was the principle which was applied in Webster v. Sturges, 7 Ill. App. 560, a case directly in point; People v. Brooks, 1 Den. 457; Smith v. Brown, 1 Wend. 231. The rule appears to be, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is, has the law been violated? Morris v. The People, 3 Den. 402, 403. In Gilbert v. Bone, 64 Ill. 524, the court said: "It is undoubtedly the general rule, that individuals charged with disobedience to penal laws can not exonerate themselves on the ground of good faith or error of judgment; and it has been held that no excuse of this kind will avail against the peremptory words of a statute imposing a penalty. If the prohibited act has been done, the penalty must be paid. Calcraft v. Gibbs, 3 T. R. 19; Caswell v. Allen, 7 Johns. 63; Morris v. The People, 3 Den. 381, 402." It follows from the principles above announced, that the averments in the eighth count of the declaration, respecting the purpose and intention of the parties in making the contract, were immaterial, because none of the matters averred would be admissible in evidence to show that the statute had not been violated, or to relieve from the consequences of such violation. The case is an interesting and important one. We have given it all the consideration practicable, under our circumstances, as regards the business of this court. We may be radically wrong in our views, but have the consolation of knowing that our decision may be reviewed by a higher tribunal where such errors as we may have fallen into can be corrected. The judgment will be affirmed.

Judgment affirmed.

ANNA VISKOCIL

V.

MARTIN DOKTOR ET AL.

37	282
82	283
37	239
85	443

Trust Deeds—Agency—Payment to Broker—Bill to Have Trust Deed and Notes Canceled—Custom.

Viskocil v. Doktor.

Upon a bill filed to have a trust deed and the notes secured thereby delivered up to be canceled, it is *held*: That the broker from whom the defendant purchased the notes in question, was not her agent to receive payment, such notes not having been left with him; and that she is not bound by his fraudulent representations not made in her presence.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Bill in equity filed by appellees against appellant and Josef Matousek, praying that a deed of trust which was executed by complainants to Matousek, conveying to him a certain lot in Chicago, to secure a loan of \$500, may be declared a cloud on complainants' title to said lot; that the trust deed and the notes secured thereby may be delivered up to be canceled. The facts are that Charles Drabek in November, 1883, was a loan agent in Chicago, and as such agent on November 2, 1883, loaned to appellees \$500, which was the money of Jan and Katerina Wachsa. The principal and interest notes were made payable to them, and the trust deed to secure the notes ran to Matousek as trustee. The notes were left in the hands of Drabek until the appellant purchased them, at which time she, or her brother for her, took possession of them, and whenever interest became due she received it from Drabek, as the notes were payable at his office, and left with him the matured interest note. In November, 1885, the principal note became due and was extended for two years, new interest notes being executed, Drabek attending to the transaction, the appellant, Viskocil, and appellees not meeting or knowing each other at the time. Before the two years extension terminated appellees paid the entire amount of the principal and interest to Drabek, although he did not have possession of the principal or last two interest notes. In April, 1887, appellees discovered that appellant held the three notes last mentioned and filed this bill for relief as stated.

On final hearing the court entered a decree as prayed for in the bill, from which appellant prayed an appeal.

Messrs. GOLDZIER & RODGERS, for appellant.

Appellees could not have been forced to make payment to any one unless he had these notes, even if they were due, and if they voluntarily made it, they did so at their own peril.

Where payment is due on a written instrument it is the duty of the debtor to call for its production. Dunlap's Paley on Agency, p. 274; Wheeler v. Guild, 20 Pick. 545.

And a payment made before maturity is made at the peril of party paying. Story on Bills and Notes, p. 214.

And even where an agent has authority to collect on negotiable instruments this does not imply an authority to collect before due. Story on Agency, Secs. 98 and 104; Austin v. Thorp, 30 Ia. 376.

Messrs. JONES & LUSK, for appellees.

We maintain that the testimony of the appellant taken alone is sufficient to show that Drabek was her general financial agent; that she did all her financial business through him; that she had loaned money through him and to him, and that she had deposited money with him, even to her last cent; that she was satisfied when he told her that "she should be satisfied; that everything is in good order."

We respectfully refer to the case of Hurd v. Marple, 10 Ill. App. 421, in which the court say: "By placing the money in his hands to loan without any restrictions or limitations upon his authority made known to third persons, appellee constituted him her general agent in that behalf."

If, therefore, Drabek was appellant's general agent in this case, he had full power to collect, extend time, collect before due, or, in short, do anything the appellant could have done.

Drabek certainly had the right to collect the notes. Her ratification of his acts in collecting the coupons would invest him with full power to collect the principal note; and we have shown, in addition, that such is the universal custom among agents of that kind, when a note is specifically made payable at the agent's office. When such a custom exists the presumption is that both parties are acquainted with it. U. S. Life Ins. Co. v. Advance Co., 80 Ill. 549; Thompson v. Elliott, 73 Ill. 221.

Foster v. Epps.

GARNETT, J. When appellant purchased the notes in question she took them from Drabek and kept them. At the maturity of an interest note she presented it for payment, in a business-like manner, at his office, where it was payable, and received her money.

He was not her agent, at any time, in respect to the making or collection of the principal or interest on this loan. Any payment made to him after she took possession of the notes was made at the peril of the parties paying. That she had other transactions with Drabek and had money deposited with him is not of the slightest importance. His fraudulent representations to appellees, not made in the presence of appellant, can not, by any known rule of law, operate to her disadvantage.

If Drabek had made the original loan for appellant, and as her agent, still he would have had no right to receive principal or interest, except where a note was left with him so as to give him apparent authority. *Cooley v. Willard et al.*, 34 Ill. 68; *Stiger v. Bent*, 111 Ill. 328; *Thompson et al. v. Elliott*, 73 Ill. 221.

The evidence introduced by appellees to prove a custom authorizing Drabek to collect the notes has no bearing on this case. The proof had no tendency to prove such a custom as would avail the appellees on the undisputed facts shown in this record.

The decree of the Superior Court is reversed and the cause is remanded.

Reversed and remanded.

GEORGE B. FOSTER ET AL.

v.

FRANK P. EPPS.

Appeal Bonds—Strict Construction as against Sureties.

1. The liability of a surety on an appeal bond will not be extended by implication or construction beyond the precise terms of his undertaking.

27	285
94	631

2. In the case presented, the Appellate Court having affirmed the judgment but eliminated from the record a finding that the amount due the plaintiff was for wages as a laborer and servant, this court holds, in an action on the appeal bond, that the judgment was affirmed within the precise terms of the condition of the bond.

[Opinion filed September 18, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was a suit by Frank P. Epps as the obligee upon a bond made June 23, 1885, by Charles L. Epps and Joseph F. Greer as principals, with George B. Foster and William Bohannon as sureties in the penal sum of \$500, conditions as follows:

"The condition of the above obligation is such that whereas the said Frank P. Epps, did, on the 6th day of June, A. D. 1885, in the Superior Court of Cook County, in the State of Illinois aforesaid, and of the June term thereof, A. D. 1885, recover a judgment against the above bounden Charles L. Epps and Joseph F. Greer for the sum of two hundred and ninety-six dollars and forty-nine cents, besides costs of suit, and whereas said court found that the demand therein sued for was wages due said Frank P. Epps as a laborer or servant, which finding was expressed in the record thereof, from which said judgment and finding of the said Superior Court of Cook County the said Charles L. Epps and Joseph F. Greer have prayed for and obtained an appeal to the Appellate Court in and for the First District of said State, upon giving bond properly conditioned in the sum of five hundred dollars. Now, therefore, if the said Charles L. Epps and Joseph F. Greer shall duly prosecute their appeal with effect, and moreover, pay the amount of the judgment, costs, interest and damages rendered and to be rendered against them, in case judgment shall be affirmed, the above obligation to be void, otherwise to remain in full force and virtue."

The case was submitted to the court for decision without a jury, upon an agreed statement of facts, from which it appeared that the judgment of the Appellate Court on said appeal was as follows:

Foster v. Epps.

"CHARLES L. EPPS ET AL.	}	Nov. 25, 1885.
vs.		Appeal.
FRANK P. EPPS.		Cook Superior.

"On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error so far as related to the words '*laborer or servant*,' as used in the statute in relation to exemptions. Therefore, it is considered by the court that, for that error in the record and the proceedings aforesaid, the judgment to that extent is erroneous. It will, accordingly, be modified by striking out the words: 'And the court finds that the said damages are due the plaintiff for wages as *laborer or servant*.' And it further appearing to the court now here that neither in the records and proceedings aforesaid, nor in the rendition of the judgment, is there anything erroneous, vicious or defective, except as above stated, and that in that record is no error except as heretofore stated.

"Therefore it is considered by the court that the judgment aforesaid in all other findings and provisions thereof be affirmed and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said Frank P. Epps, appellee, pay the costs of this appeal in this behalf expended to be taxed, and that the said appellants have execution therefor."

The trial court found the issues for the plaintiff; that his debt was \$500, and damages the sum \$347.48, for which judgment in proper form was given, and the sureties appealed to this court.

Messrs. McMURDY & JOB, for plaintiffs in error.

Messrs. MOSES & NEWMAN, for defendants in error.

McALLISTER, J. We have duly considered this case, and

fail to find that in the judgment rendered the court extended the liability of the surety beyond the precise terms of the condition of the bond by implication or construction. For it is undoubtedly the law that in such a case as this the liability of the surety will not be extended by implication or construction beyond the precise terms of his undertaking, which is to be strictly construed. *Abrahams v. Jones*, 20 Ill. App. 86, and authorities there cited.

The Appellate Court affirmed the judgment, but eliminated from the record a finding to the effect that the damages were due the plaintiff for the wages as "laborer and servant." The condition was, "Now, therefore, if the said Charles L. Epps and Joseph F. Greer shall duly prosecute their appeal with effect, and moreover pay the amounts of the judgment, costs, interest and damages rendered and to be rendered against them, *in case judgment shall be affirmed*, the above obligation to be void, otherwise to remain in full force and virtue."

We think the judgment was affirmed within the precise terms of the condition as above stated, and that the judgment below was not erroneous and should be affirmed.

Judgment affirmed.

RALPH PLUMB

V.

ABNER TAYLOR ET AL.

Sales—Dependent Agreements—Tender of Performance—Failure to Make—Delivery to Trustee—Action to Recover Price—Renunciation—Effect of—Receiver—Assignment.

1. Where the agreements between contracting parties are mutual and dependent, neither party without a tender of performance can demand performance of the other. To maintain an action for the recovery of the purchase price of an article agreed to be sold by such a contract, it is necessary to aver and prove performance or tender of performance by the plaintiff. Mere readiness to perform is insufficient to support the action.

2. In the case presented, it is *held*: That the delivery of the railroad

Plumb v. Taylor.

stock in question to a trustee in escrow, was not a tender to the defendant, nor a full performance on the part of the plaintiffs; that, upon the expiration of the trust, the defendant was under no obligation to take the necessary steps to procure possession from the trustee; that there was no such renunciation on the part of the defendant as to render a tender unnecessary, and that it does not appear that there was an assignment from the receiver of the firm of which certain of the plaintiffs were members.

3. Where there is a renunciation of a contract by one of the parties before the time for performance, the contract will remain in existence for the benefit, and at the risk of both parties, unless the other party accepts the renunciation and treats the contract as broken as soon as it is announced.

[Opinion filed September 18, 1888.]

IN ERROR to the Circuit Court of Cook County: the Hon. RICHARD S. TUTHILL, Judge, presiding.

Suit in assumpsit by defendants in error against plaintiff in error. The declaration consists of two special counts, and the common counts for goods sold, money lent, etc. The special counts allege that by the terms of a contract dated October 10, 1878, it was agreed, among other things, that plaintiffs, Abner Taylor, Thomas Snell, James T. Snell and James Aiken, partners under the firm name of Snell, Taylor & Co., and Henry H. Porter, should assign to Plumb \$700,000 in shares of stock of the Decatur & State Line Railway Company, and in consideration thereof, and of the work done and the money advanced by the plaintiffs in the construction of the road of said railway, so far as then constructed, the defendant promised the plaintiffs to pay them \$42,600 on or before July 1, 1879, with interest after May 1, 1879, at seven per cent. per annum, in such manner and on such terms as thereafter might be agreed upon, and also that plaintiffs were to receive of townships along the line of road ten per cent. of certain bonds then expected by said parties to be issued in aid of the construction of said road; that plaintiffs should procure from the receiver of the firm of Snell, Taylor & Co., in pursuance of such order of court as might be necessary, all such assignments, transfers and confirmations as might be necessary to effectuate the performance of said contract, and that they should cause to be

delivered to defendant all the records, writings, books, maps and profiles, in any way pertaining to the description of said road. The special counts then allege that plaintiffs did then and there assign to defendant said \$700,000 of stock; that at the time of making said contract, with the consent of defendant, plaintiffs transferred to Solon Humphreys the certificates of stock of said railway company, amounting to \$700,000, who was to hold them as security for payment by defendant to plaintiffs of said sum of \$42,600, and upon such payment to deliver said certificates to defendant; that plaintiffs did procure from the receiver of said partnership of Snell, Taylor & Co., all such assignments, transfers and confirmations as were necessary to fully effectuate the performance of said contract on their part; and that plaintiffs caused to be delivered to defendant all records, memoranda, writings, books, maps and profiles, in any way pertaining to the description of road, and immediately delivered said road to defendant; and that defendant has wholly failed to pay plaintiffs the said \$42,600 or any part thereof. The defendant filed a verified plea of the general issue. The cause was tried by the court without a jury. Issue found for plaintiffs, damages assessed at \$67,938.83, to which defendant excepted. Motion for a new trial by defendant overruled and exception by defendant. Judgment for plaintiffs for \$68,040.73, being amount of the finding and \$101.90 for interest on the finding from date thereof to time judgment was entered. Defendant sued out this writ of error to reverse said judgment.

Messrs. JNO. N. JEWETT and JEWETT BROTHERS, for plaintiffs in error.

Messrs. B. C. COOK and CHAS. H. LAWRENCE, for defendant in error.

GARNETT, J. The agreement by appellees to assign the \$700,000 of stock, and that by appellant to pay therefor \$42,600, were mutual and dependent, and neither party, without a tender of performance, could demand performance of

Plumb v. Taylor.

the other. There is nothing in the contract to indicate that either party understood it otherwise. The courts are disposed to favor that construction of contracts of this description which makes the agreements dependent, and they are so considered, unless the contrary clearly appears. *Bank of Columbia v. Hagner*, 1 Pet. 465.

To maintain an action for the recovery of the purchase price of the article agreed to be sold by a contract of that kind, it is necessary to aver and prove performance or tender of performance by the plaintiff. Mere readiness to perform is not sufficient to support an action on the agreement. *Bishop on Contracts*, Sec. 1433; *Lester v. Jewett*, 11 N. Y. 453.

Counsel for appellees do not dispute the necessity of performance or tender of performance on the part of appellees, but they strive to meet this difficulty by two distinct answers. They first set up a contract made October 17, 1878, between the Wabash Railway Company, The Decatur & State Line Railway Company, Snell, Taylor & Co., Ralph Plumb and Solon Humphreys, trustee, in which it was agreed that certain contracts (not including that sued on in this case), and the certificate for said \$700,000 of stock should be placed in the hands of Humphreys, to be held by him in trust until Plumb had, by sale of \$1,080,000 bonds of the Decatur & State Line Railway Company or otherwise, paid to the trustee for Snell, Taylor & Co. the \$42,600 mentioned in the contract sued on, or secured such payment to Thomas Snell, Abner Taylor and H. H. Porter for Snell, Taylor & Co., in such manner as they should, over their signature, indicate to the trustee, provided such payment be made or secured on or before May 1, 1879; that if such payment was so made or secured, said contracts to remain in full force, one copy of each to be delivered to each party executing the same, and the certificates of stock to be delivered by the trustee according to contract; but if this payment was not made or secured on or before May 1, 1879, the contracts deposited should be void, the trustee to cancel them and return to each party one of each, with his certificate of cancellation, and the certificates of stock to the order of Snell, Taylor & Co., and the trust to expire.

That contract was carried out to the extent of delivering to Humphreys the documents and certificates of stock specified, but Plumb failed to make any payment on or before May 1, 1879, and, in fact, has never paid any part of the \$42,600 to Humphreys or to appellees. The certificates of stock remained in the hands of Humphreys until after May 1, 1879, but were never tendered to Plumb until this case was actually on trial, when they were produced and offered to him in open court. The appellees contend that the delivery to Humphreys was a full compliance with the contract on which this action is founded, because they thereby relinquished control of the stock, placing it in the power of Plumb to take it at any time on payment of the money, and that the "tender" (we surmise this to mean the placing of the certificates in Humphreys' possession,) was kept good by bringing the certificates into court and offering them to the defendant. But appellees did not, by putting the stock in escrow, lose anything more than the physical possession of the certificates. It was still in the possession of their trustee, and was of no more benefit to Plumb than it would have been in possession of Snell, Taylor & Co. He could then have taken it at any time on payment of the money, although no contract had ever been made with Humphreys. Then the argument is too swift in reaching the point where the tender is kept good, before any tender is made. The delivery to Humphreys was no tender to Plumb, and the record is barren of evidence of any other. The agreement of October 17th expired by its own terms May, 1, 1879. Appellees then had two months left in which to procure the certificates and offer them to appellant. The trustee could not, after that date, accept the \$42,600 and deliver the stock to him. Any payment made by Plumb to Humphreys after that date would have been made at his peril. He was not obliged to apply to appellees for an order on Humphreys, while Humphreys could not deliver it without an order. The trust having expired and the stock remaining in the trustee's possession, there is no principle of law which imposed upon the purchaser the additional burden that would have been necessary to secure possession from Humphreys.

The second answer of defendants in error is that Plumb, in April or May, 1879, renounced the contract, and therefore they were not bound to make a tender. There was evidence to prove that Plumb did tell Taylor that he could not carry out the contract. Treating this statement as a renunciation, we have this simple change wrought in the relation of the parties, viz.: the defendants in error might have accepted it as a breach of the contract by Plumb, and brought suit for damages at once. Plumb's statement did not amount to a discharge of the contract, except at the election of the defendants in error. He could not elect for them, and thus confine their remedy to an action for damages for the breach. They might still insist on performance of the contract, and on tendering performance of their part, sue for the whole purchase money. In *Anson on Contracts*, pp. 271, 272, the author says: "It is now settled that a renunciation of a contract by one of the parties before the time for performance has come discharges the other *if he so chooses*, and entitles him at once to sue for a breach. * * * The promisee may therefore treat the contract as broken as soon as the promisor has announced his intention to break it; but if he will not accept the renunciation, but continues to insist upon the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties."

No evidence was introduced tending to prove that defendants in error elected to treat the contract as broken by Plumb. They waited until after the time for performance elapsed, then brought this action for the purchase price, and the amount of the recovery was \$42,600 and interest. The failure to make a tender of the certificates of stock is a fatal objection to the judgment.

In addition to what has been said, it may be added that no effort was made to prove any assignment, transfer or confirmation by the receiver of Snell, Taylor & Co. The agreement sued on admitted that there was then a receiver for that firm, and it must be presumed that no valid transfer could be made of any firm assets without action by the receiver and the court appointing him. This goes to the root of the title to such

interest in the stock as Snell, Taylor & Co. had, and no court can hold a purchaser liable for the price while that infirmity remains.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

ORSON P. KELLOGG

v.

JAMES H. KEELER.

Agency—Authority to Sell for Stipulated Price—Sale for Larger Sum—Evidence.

Authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he receives above that sum. It is still his duty to obtain the highest price for which the property will sell and account to his principal for the proceeds.

[Opinion filed September 18, 1888.]

APPEAL from the Circuit Court of Cook County; the
HON. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. STERN & ERRANT, for appellant.

Mr. JOHN C. SCOVEL, for appellee.

GARNETT, J. This was an action of assumpsit by appellee against appellant, judgment being given for \$750 against appellant, from which he appeals. In the summer of 1886 Keeler sold to Kellogg four lots in Chicago for \$6,400. The transaction was not closed by deed until late in October of that year. Before the delivery of the deed to Kellogg the lots were again sold by Keeler to one Hill for \$7,550. The latter sale was made, as Keeler now claims, by authority of Kellogg-

In his evidence Keeler says, when he agreed to let Kellogg have the property for \$6,400, he told him he would let him have it if he would allow him (Keeler) to re-sell it for him; that Kellogg said if he made \$100 a lot profit he would be satisfied; that he (Keeler) told him he thought he could sell it for that before he got the deed, as property was advancing. That authority given to sell the lots for \$6,800 is, to some extent, corroborated by the evidence of Hoffman, a witness for appellee. But there is no evidence in the record tending to support appellee's claim that he is entitled to the difference between \$6,800 and \$7,550. To maintain that proposition he testified to a conversation with appellant some months after he was given authority to sell, when he put certain questions to appellant for the purpose of securing an admission that he was to have all he sold the lots for above \$6,800. But Kellogg made no such admission, nor does any witness testify that such was the contract. There is, in fact, nothing in the record that warrants appellee's contention. Authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he sells for above that sum. *Kerfoot v. Hyman*, 52 Ill. 512. It is still the duty of the agent to make the property bring the highest price that can be obtained, and account to his principal for the whole sum less his reasonable compensation.

The only evidence as to what was a reasonable compensation on such a sale tended to prove that the highest reasonable charge would be a much less sum than \$750.

There being no evidence to support a verdict for \$750, the judgment is reversed and remanded.

Reversed and remanded.

HENRY SWEET
v.
LOUIS MERKI.

27	245
112	614

Appeal and Error—Final Judgment.

A final judgment is one that puts an end to the action so that nothing remains to be done except to execute the judgment.

[Opinion filed September 18, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. MOSES & NEWMAN, for plaintiff in error.

Mr. ARNOLD TRIPP, for defendant in error.

MORAN, P. J. This writ of error was brought to review the action of the court in entering a judgment by confession.

From a supplemental record which has been filed, it appears that, on motion of plaintiff in error, the court has granted him leave to plead, the judgment entered to stand as security till the merits are tried. It thus appears that material issues in the case stand open for adjustment in a future trial, and that the controversy between the parties is not finally determined. A final judgment is one that puts an end to the action so that nothing remains to be done but to execute the judgment.

The record discloses that no final judgment had been entered in this case. There is no jurisdiction, therefore, in this court to review the record at this stage in the case, and the writ of error must be dismissed.

Writ of error dismissed.

ELIZA W. OSBORNE ET AL.

V.

ORLANDO F. GIBBS ET AL.

Insolvency—Authority of County Court to Authorize Sales—Adverse Claims—Option to Purchase Real Estate—Assignment of.

1. The County Court can not be required to try and determine intricate and conflicting claims to property before authorizing the assignee of an insolvent to sell whatever interest the estate possesses therein.

2. What to order the assignee to dispose of is within the discretion of the County Court. In the case presented this discretion has not been abused, the orders in question being for the sale of an option to purchase certain real estate.

[Opinion filed September 18, 1888.]

IN ERROR to the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. J. L. HIGH and J. W. SMITH, for plaintiffs in error.

A voluntary assignment for the benefit of creditors is not a judicial sale or judicial transfer of property, but is purely the voluntary act of the debtor. The assignee is not a purchaser for value but a mere volunteer. The assignment conveys no other or larger interest than that of the assignor, and the property conveyed is subject to all limitations and restrictions existing against the assignor. Taylor, the assignee, could, therefore, acquire no interest in the leasehold, or in the option to purchase contained in the lease, without the written consent of the lessor. Burrill on Assignments, Secs. 2, 14; Ludington's Petition, 5 Abbott's N. C. 312; Manny v. Logan, 27 Mo. 528; Perry Insurance Company v. Foster, 58 Ala. 521; In re Fulton's Estate, 51 Pa. St. 211; Dia'n v. Mickel, 8 Iowa, 438; O'Hara v. Jones, 46 Ill. 288; Beck v. Parker, 65 Pa. St. 262; Dehner v. Helmbacher Forge and Rolling Mills, 7 Ill. App. 47.

The statute regulating assignments for the benefit of creditors does not affect the power of the debtor to assign, nor does it enlarge the estate or property interests conveyed to the assignee. The statute is merely declaratory of the common law, and provides a forum for administering the assets, and regulates the procedure. The assignee has no other or greater power of alienation than the debtor, and can sell no interest in either realty or personalty which the debtor himself could not have sold. Bishop on Insolvent Debtors, Sec. 130, and cases cited; Act Concerning Voluntary Assignments, R. S., Chap. 10a, Sec. 11; Eames v. Mayo, 6 Ill. App. 334; Thrasher v. Bentley, 1 Abbott's N. C. 39.

The option to purchase the premises in controversy contained in the lease is a right personal to the lessees, and does not extend to their assignees or representatives. It is purely a personal option or privilege conferred upon the lessees,

which can not be enlarged or alienated without the written consent of the lessor.

Mr. JAMES S. MURRAY, for defendant in error.

The option to purchase the premises was not controlled or limited by the provision requiring the assent of the lessor to the assignment of the lease, but passed to Taylor by virtue of the statute. *Gorham v. Farson*, 119 Ill. 427; *Hunter v. Silvers*, 15 Ill. 175; *Perkins v. Hadsell*, 50 Ill. 216; *Stewart v. Metcalf*, 68 Ill. 113; *Green v. Low*, 22 Beav. 625; *Lord v. Stephens*, 2 Y. & C. Ex. 222.

It was a proper exercise of the discretion of the court to refuse to allow the plaintiffs in error to intervene in the assignment proceeding. *Thielman v. Burg*, 73 Ill. 293; *Boyle v. Levi*, 73 Ill. 175; *Jack v. Weiennitt*, 115 Ill. 105.

Per Curiam. By this writ of error it is sought to reverse certain orders of the County Court of Cook County, authorizing the sale to Charles Dickinson, one of the defendants in error, of an option to purchase certain real estate in the city of Chicago. The option was given to Orlando F. and Oscar L. Gibbs, in a lease to them by David M. Osborne, dated May 30, 1884. The lessor died July 5, 1886, leaving the plaintiffs in error, his devisees, owners of the property, subject to the lease. About December 7, 1887, the lessees became insolvent, and executed an assignment for the benefit of their creditors to Joel V. Taylor, assignee, and at the time of the orders in question the estate was in process of settlement in the County Court.

The plaintiffs in error are not creditors of the insolvents nor have they any concern in the administration of the insolvent estate. They appeared in the County Court for no other purpose than to oppose the action of that court in its efforts to convert into money that which is, in good faith, represented to belong to the estate.

The reason assigned for the opposition is that the option was personal to the lessees, not susceptible of transfer, and therefore a sale by the assignee will create a cloud on the title

Pederson v. Cline.

of the owners of the property. Without expressing any opinion on the assignability of the option, we see no reason to interfere with the action of the County Court. It is not a court of equity jurisdiction, where application may be made to remove clouds already created, much less those merely anticipated.

It can not be required to try and determine various and intricate conflicting claims to property, before authorizing the assignee to sell whatever interest the estate possesses. The adverse claimants are in no wise injured by such proceedings, as they have access to the appropriate tribunal for redress. Sec. 11 of Chap. 100 of the Revised Statutes can not be considered in the light of a prohibition which prevents a sale by the assignee of whatever interest the estate has, where such interest is uncertain, or may be, at the end of a tedious litigation, declared to have no foundation.

This would be entirely inconsistent with the spirit of the act which encourages quick settlement and distribution among the creditors. What the court will order the assignee to dispose of is within its discretion, which we think has not been abused in this case.

The orders of the County Court are affirmed.

Orders affirmed.

ANDREW PEDERSON

V.

GEORGE T. CLINE.

Forcible Entry and Detainer—Title.

In an action of forcible entry and detainer inquiry can not be made into the title of the premises in question. Hence it is no defense that the defendant entered without any actual force or breach of the peace under claim of an adverse title.

[Opinion filed September 18, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. H. S. MECARTNEY, for appellant.

Messrs. NORTON, BURLEY & HOWELL, for appellee.

Possession of premises by such visible tokens as fencing or building is sufficient to maintain the action of forcible entry. *Brooks v. Bruyn*, 18 Ill. 539; *Spurck v. Forsyth*, 40 Ill. 438; *Pearson v. Herr*, 53 Ill. 144; *Allen v. Tobias et al.*, 77 Ill. 169; *Knight v. Knight*, 3 Ill. App. 206.

Actual occupancy at the time of the entry by another is not necessary. *Pearson v. Herr*, 53 Ill. 144; *Knight v. Knight*, 3 Ill. App. 206; *Doty v. Burdick*, 83 Ill. 473.

The possession of keys to premises obtained from a tenant, without his landlord's consent, gives no right of possession. *Doty v. Burdick*, 83 Ill. 473.

Actual violence is not necessary to constitute a forcible entry. *Croff v. Ballinger*, 18 Ill. 200; *Smith v. Hoag*, 45 Ill. 250; *Doty v. Burdick*, 83 Ill. 473.

Deeds can not be introduced to show title or right of possession in an action of forcible entry and detainer. *Brooks v. Bruyn*, 18 Ill. 539; *Smith v. Hoag*, 45 Ill. 250; *Pearson v. Herr*, 53 Ill. 144; *State v. Eisenmeyer*, 94 Ill. 96.

McALLISTER, J. This was an action for forcible detainer of certain premises described in the complaint, brought by appellee against appellant in justice's court. On appeal to the Circuit Court the case was tried by the court without a jury. On the trial the evidence on behalf of the plaintiff tended to show that the premises situated in the village of Winnetka consisted of five acres of ground with a house thereon; that the plaintiff had been in possession of the premises for the period of nearly ten years next before the entry into the same made by the defendant, and that such entry was forcible; that it was effected by breaking into the house through one of its windows while such house was temporarily vacant, but securely locked up and fastened; and the evidence tended to show a

Marquis v. City of Chicago.

proper demand made upon defendant for the possession before bringing the suit.

The court admitted, subject to objection by plaintiff, evidence on behalf of defendant tending to prove a tax title in one Stanley to the premises, and that defendant was put in possession by Stanley's lessee.

The defendant's counsel asked the court to hold as law the following proposition: "If the proof shows that Stanley claimed title to the premises in question by or under an adverse source to that of plaintiff's claim to the same, and that he, Stanley, under said claim of title made a lease of the premises to Richardson, who, under the lease, put Pederson in possession, and the entry was accomplished without any actual force or breach of the peace, then plaintiff can not recover in this proceeding." The court refused to so hold.

We are of opinion that the uncontradictory testimony in the case tended to make out a case within the statute concerning forcible entry and detainer, as it has been construed in numerous cases by our Supreme Court.

The proposition of law above stated, could not be held as law and applied, unless it was competent for the court to inquire into the title to the land in question. That it was not competent is well settled. *Kessly v. Luke*, 106 Ill. 395, and cases there cited. We perceive nothing in the questions decided in the case of *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, or in the reasoning found in the very learned and discriminating opinion of Chief Justice Mulkey, in that case, which can raise the slightest doubt as to the propriety of the judgment in this case. The judgment will be affirmed.

Judgment affirmed.

FRANK MARQUIS
v.
CITY OF CHICAGO.

Where general words in a penal statute follow an enumeration of particular cases, such words are held to apply only to cases of the same kind as those expressly mentioned.

[Opinion filed September 18, 1888.]

APPEAL from the Criminal Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. CONDEE & ROSE, for appellant.

Penal statutes must be construed strictly. *People v. Peacock*, 98 Ill. 172.

In construing statutes, particularly those requiring a strict construction, it is a universal rule that general words following a specified enumeration of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated. *Potter's Dwaris*, 247, 248; *In re Swigert*, 119 Ill. 89; *Shirk v. People*, 121 Ill. 61; *City of St. Louis v. Laughlin*, 49 Mo. 559; *King v. The Inhabitants of Whitnash*, 7 Barn. & C. 596; *Sandiman v. Breach*, 14 Eng. Com. Law, 52.

Mr. BENJ. L. RICHOLSON, for appellee.

In modern times, and especially in later years, the strong tendency of all our courts has been to hold that strict construction of penal statutes means that the statute shall not be extended beyond the letter to cases within the "equity of the act." The rule in this country is that courts will not extend such statutes so as to include the "equity," or spirit of the act, but they will not be swift to find reasons for not enforcing the manifest intention of the legislature. And it is the business of our courts to ascertain what the intention of the legislature was, and where the intention is manifest, they will enforce that intention without reference to what they think the policy of the law should be; and particularly so in this State, where the government is divided into the legislative, executive and judicial departments, and each of these departments is, by the constitution, prohibited from exercising the function of any other department. Hence, the primary rule, in

Marquis v. City of Chicago.

the construction of all statutes, is to find what was the intention of the legislature, or as in this case, the city council. Penal statutes will not be extended beyond the plain letter of the law, but if the law is plain it will follow it, whatever the consequences, and words should not be imported into a statute to extend or restrict its scope beyond the plain intent, but are to be so construed as fairly to suppress the mischief and advance the remedy. Sedgwick on Construction of Statutes and Constitution, p. 280, note, and 281; Conkling v. Ridgely & Co., 112 Ill. 36.

GARNETT, J. This is an appeal from a fine of \$100, imposed by the Criminal Court of Cook County, on the appellant, for alleged violation of Sec. 1307 of the Revised Ordinances of the City of Chicago.

The ordinance is: "No person or persons shall set up, keep or maintain, or permit to be set up, kept, or maintained, in any house or place within the corporate limits occupied or controlled by him or them, any E. O., A. B. C., rooley pool, keno or faro table, faro bank, roulette, or other instrument, device or thing for the purpose of gaming, or with which money, liquor, or any thing of value shall in any manner be played for, under the penalty of not less than one hundred dollars for each and every offense."

There was no evidence tending to prove the appellant guilty of keeping or maintaining any of the instruments or devices specifically named in the section, but the proof showed he kept what might be called a lottery or policy shop, and it is so designated by one of the witnesses. For appellee, it is contended that the general words in the ordinance "or other instrument, device or thing for the purpose of gaming," covers the act charged against appellant. That is opposed to the well established rule for the construction of penal statutes, which the Supreme Court of this State has announced in *Shirk v. The People*, 121 Ill. 61. In that case the indictment was founded on Sec. 107 of the Criminal Code, prescribing a punishment in the penitentiary for making, passing, uttering or publishing, with an intention to defraud any other person, any ficti-

tious bill, note or check, or other instrument of writing for the payment of money or property.

The instrument which Shirk was charged with feloniously uttering, publishing and passing was not a bill, note or check, or of the same class as bills, notes and checks, although it contained, among other things, a written contract to pay money. But the court held the indictment could not be sustained, adhering to the rule that if general words in a penal statute follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned.

To the same effect, see *City of St. Louis v. Laughlin*, 49 Mo. 559; *Sandiman v. Breach*, 14 E. C. L. 52; *Regina v. Reed*, 28 E. L. & E. 133.

The punishment under Sec. 1307 of the ordinance being erroneous, the judgment of the Criminal Court is reversed.

Judgment reversed.

FRED. MYERS

V.

THE UNION NATIONAL BANK.

Banks—Checks—Acceptance—Telegram—Appropriation by Bank of a Deposit to Pay Indebtedness to Itself—Notice.

1. A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds. Its duty is to pay or accept only upon presentation.

2. A telegram by a bank to the holder of checks of a depositor stating that "Drafts named are good now," is not an acceptance.

3. A bank may appropriate the funds of a depositor to pay an indebtedness to itself, after receiving notice by telegram that the holder of checks of such depositor has sent a messenger to present them.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

27	254
46	298
27	254
50	338
50	444

Myers v. Union National Bank.

Assumpsit by appellant against appellee on three checks drawn in September, 1883, by J. R. Snyder, then a banker at Chenoa, Illinois. They were as follows: September 10, 1883, \$1,000; September 17, 1883, \$1,200; and September 17, 1883, \$1,600.

The three checks were exactly alike, except as to dates and amounts. The first was as follows:

"\$1,000.

(Duplicate unpaid.)

"BANK OF CHENOA, }
J. R. SNYDER, Banker. }

"CHENOA, ILL., Sep. 10, 1883.

"Pay to the order of Fred Myers, Esq., one thousand and no 100ths dollars.

To UNION NATIONAL BANK, Chicago, Ill.

"J. R. SNYDER, per Lester."

On September 28, 1883, the three checks were placed by appellant in the hands of his agents, Haynes, Gordon & Co., for collection. On the morning of the 29th of September, 1883, they telegraphed appellee as follows:

"9 A. M., CHENOA, ILL., 9-29, 1883.

"To UNION NATIONAL BANK, Chicago.

"Will drafts for thirty-eight hundred dollars, made by J. R. Snyder on you, be paid if presented Monday?

"HAYNES, GORDON & Co."

To which on the same day appellee replied:

"10:50 A. M., 9-29, 1883, CHICAGO, 29.

"To HAYNES, GORDON & Co., Chenoa, Ill.

"Drafts named are good now.

"J. P. ODELL, Cashier."

To which appellant replied:

"11:29 A. M., CHENOA, Sept. 29, 1883.

"To J. P. ODELL, Cash. Union National Bank, Chicago.

"We have sent a man with drafts. Will be there before, three o'clock.

"HAYNES, GORDON & Co."

In the meantime, *i. e.*, between the second and third dispatches, appellee had telegraphed to Snyder inquiring if he

was in trouble, and he had replied that he was in trouble.

September 22, 1883, John R. Snyder gave his note to appellee for \$5,000, payable on demand at its bank. The note was given for money then loaned by appellee to John R. Snyder. The money so loaned was placed by appellee to the credit of John R. Snyder on its books.

On the opening of appellee's bank on the morning of the 29th of September, 1883, there was to John R. Snyder's credit in appellee's bank \$5,935.17. During the day other drafts, to the amount of \$952.63, drawn by John R. Snyder, were paid by appellee. After the receipt of the last above telegram from appellant, appellee made demand for the payment of its \$5,000 note at its office (Snyder was not present), and it not being paid, charged it up to Snyder, which, with the \$952.68, exceeded Snyder's balance \$23.29.

September 29, 1883, Haynes, Gordon & Co. sent one E. J. Davis to Chicago with the checks to collect them. He arrived at appellee's bank somewhere between two and three o'clock, and made demand for the payment of the checks, which was refused by appellee. This demand was after appellee had charged up the \$5,000 note to Snyder's account.

Trial by the court without a jury. Finding and judgment for the defendant. Exception and appeal by plaintiff.

Messrs. KERRICK, LUCAS & SPENCER, for appellant.

"It is the settled law, and has been twice decided by this court, that a parol promise to accept an existing bill is valid." *Nelson v. First Nat. Bank*, 48 Ill. 40; *Sturges v. First Nat. Bank*, 75 Ill. 595; *Mason v. Dousay*, 35 Ill. 424; *Edwards on Notes and Bills* (3d) Sec. 567; *Daniel on Neg. Inst.* (3d) Sec. 496.

"According to the law merchant, an acceptance may be, (1) expressed in words; (2) implied from the conduct of the drawer; (3) it may be verbal or written; (4) it may be in writing on the bill itself or on a separate paper." *Daniel's Neg. Inst.* (3d) Sec. 496.

Acceptance by telegram is sufficient. *Central Savings Bank v. Richards*, 109 Mass. 414; *Coffman v. Campbell*, 87 Ill. 98; *Whilden v. Merchants, etc.*, 64 Ala. 1.

Myers v. Union National Bank.

Each of the following has been held to constitute an express acceptance. "Accepted," "seen," "honored," "presented," "I will pay the bill," or writing the day and month when presented. *Phillip v. Frost*, 19 Me. 77; *Dufour v. Oxenden*, 1 Moody and R. 90; *Leslie v. Hastings*, 1 Moody and M. 119; *Barnett v. Smith*, 10 Foster, 256; *Spear v. Pratt*, 2 Hill, 582; *Anonymous*, Comb. 401; *Story on Bills*, Sec. 243; 1 Par. N. and B. 282; *Ward v. Allen*, 2 Mtc. 53; *Leach v. Buchanan*, 4 Esq. 226; 1 Par. N. and B. 243; *Cunningham on Bills*, 26.

In the following cases "good" has been held to constitute a certification. *Barnett v. Smith*, 10 Foster, 262; *Wellett v. Phenix Bank*, 2 Duer, 121; *Guard Bank v. Bank of Penn.*, 39 Pa. St. 92; *Farmers and Mechanics Bank v. Butchers and Drovers Bank*, 4 Duer, 219; *Merchants Bank v. State Bank*, 10 Wall. 605; *Bickford v. First Nat. Bank*, 42 Ill. 240; *Espey v. Bank of Cincinnati*, 18 Wall. 617; *Meads v. Merchants Bank*, 25 N. Y. 146; *Robson v. Bennett*, 2 Taunton, 322.

Therefore, assuming that when the cashier of a bank pronounces it "good" it is a certification, what is the effect of such certification? By the certification of checks "the bank becomes the principal debtor. When the holder presents the check to the bank, the latter can only respond to the demand for payment by making payment." *Daniel on Neg. Inst.* Sec. 1603; *Edwards on Bills and Notes*, Secs. 565 and 566.

"Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, estops the bank from thereafter denying it." *Pope v. Bank of Albion*, 59 Barb. 237.

See also, *Barnett v. Smith*, 10 Foster, 260; *Farmers and Mechanics Bank v. Butchers and Drovers Bank*, 4 Duer, 219; *Morse on Banks and B.* (2d Ed.), 103; *Daniel on Neg. Inst.* (3d Ed.), Secs. 1601, 1602 and 1603; *Bickford v. First Nat. Bank*, 42 Ill. 241.

It seems to us, therefore, that for the cashier of a bank to pronounce a check drawn on the bank as "good," is for the bank to enter into an unconditional engagement to pay the

check, or at least, if the drawer, at the time, has sufficient funds in the bank to pay such check, to hold such funds for the purpose of paying the check, when payment may be demanded. Did adding "now" to the statement that the checks were "good" have the effect to limit or change the acceptance? If the checks were "good now," when and by whose act did they cease to be "good?" If at all, evidently only by the act of appellee, when it charged up to Snyder the amount of his demand note. May a bank, after it has knowledge of outstanding checks drawn on it, against funds of the drawer, in its hands, and which it has previously declared "good now," use the funds in its hands that made the check "good now" for the purpose of paying a subsequently maturing debt of the drawer, in its hands? It would seem to us that it could not do so.

If a check is, by the bank on which it is drawn, made "good now," it will continue "good" until some act of the holder—as receiving payment, or permitting the statutes of limitation to run—renders it not good.

The language "good now" is the language of appellee, and of course is to be most strongly construed against it.

If a party designs to make his acceptance conditional, it is his duty "to express clearly the condition of his acceptance, if he designs to make it conditional, and the burden is upon him to show it and not upon the holder of the bill." Chitty on Bills, 303.

Mr. MELVILLE W. FULLER, for appellee.

The mere drawing of the checks in question did not operate as an appropriation of that amount of money at the date of the checks and prior to their presentation, as between Myers and the Union National Bank or any other check-holder whose checks were presented before these checks were.

Bank checks are not bills of exchange, although they have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Some points of difference are that a check is drawn on a bank or banker. No days of grace are allowed. The drawer is not

Myers v. Union National Bank.

discharged by the *laches* of the holder in presentment for payment unless he can show that he has sustained some injury by the default. It is not necessary that the drawer of a bill should have funds in the hands of the drawee, while a check in such case would be a fraud.

In *Merchants Nat. Bk. v. Ritzinger*, 118 Ill. 484, the essential characteristic of a check is held to be that it shall be instantly payable on demand.

And a check "is not due until payment is demanded, and the statute of limitations runs only from that time." *Merch. Bank v. State Bank*, 10 Wall. 647.

It is indisputable that a check is never presentable for acceptance, but only for payment; that is, the holder has no right to demand anything save a cash payment; he has no claim upon the bank to accept. *Morse v. Mass. Nat. Bank*, 1 Holmes, C. C. 209; 2 Dan. Neg. Inst. (3d Ed.), Sec. 1601; *Morse on Banks* (2d Ed.), 259.

"If the bank has funds to pay the check, or all checks presented, it must pay them, although the bank or its paying officer may know that other checks have been drawn which, when presented, will go beyond the funds." 2 *Parsons on Notes and Bills*, p. 78.

"The rights of the holder of the check and the bank will be fixed from the time the check is presented for payment." *Fourth N. Bk. v. City N. Bk.*, 68 Ill. 399.

"The rights of the parties became fixed upon presentation." *Munn v. Burch*, 25 Ill. 35.

"The mere priority in the drawing of a check upon a bank is not sufficient to give to the holder of such check a legal right to preference in payment out of the funds of the drawer over the holders of checks subsequently drawn. And where different checks are presented to the bank at the same time for sums which, in the aggregate, exceed the amount of the funds of the drawer, the officers of the bank are not bound to settle the conflicting claims of the holders of the different checks to priority of payment." *Dykes v. Leather Man. Bank*, 11 Paige. 612.

The inquiry here is, after all, not as to what would be, in the

abstract, a sufficient demand to hold an indorser, but whether this bank, holding Snyder's note, payable to itself on demand at his office, had the right to demand and pay itself without first hunting up Snyder and requesting him, personally, to pay, he having telegraphed that he would have to close.

In *Home National Bank v. Newton*, 8 Ill. App. 563, a very well considered case, this court held it to be "a settled principle that where a depositor in a bank is indebted to the bank by bill, note, or other independent indebtedness, the bank has the right to apply so much of the funds of the depositor as may be necessary to satisfy the bank," and that "the same rule obtains where a depositor makes his paper to third persons, payable at the bank. As it is the duty of the bank to pay its customers' checks, when in funds, so at least it has authority, if it is not under actual obligation to pay his notes and acceptances made payable at the bank. It is a presumption of law that if a customer does so make payable or negotiable at a bank, any of his paper, it is his intent to have the same discharged from his deposit." This latter application of the rule, when confined to the regular customers of the bank, is sustained by the text books and the weight of authority. 1 *Daniel's Neg. Inst.* (3d Ed.), Secs. 326*a* and 326*b*, and cases cited in notes. *Morse on Banking* (2d Ed.), p. 37.

But whether a bank at which paper is payable may apply the maker's funds (he being a regular customer) to pay it or must do so, need not to be discussed, as it is well settled that when a bank is itself the holder of a bill or note there payable, it may apply to the funds of the principal payor to pay it. 1 *Danl. Neg. Inst.* (3d Ed.), Sec. 326*b*; *Dawson v. Real Est. Bank*, 5 Pike, 284; *McDowell v. Bank of Wilmington*, 1 Harr. 369. Where the bill or note is made payable at a particular bank, and the bank itself is the holder, all the demand that is necessary is for the bank to examine the account of the maker, and if he has any balance, "the bank would have a right to apply it to the payment of the note." *Bank v. Smith*, 11 Wheaton, 171, on p. 178; 6 *Curtis' Dec.* 550; *Lord v. Thornton*, 3 Leigh, 695; *State B. v. Armstrong*, 3 Dev. 519; *Ætna N. B. v. Fourth N. B.*, 46 N. Y. 88; *Kymer v. Laurie*, 18 L. J. Q. B. 218.

Myers v. Union National Bank.

And undoubtedly where the bank loans money to its depositor upon his note, payable to the bank on demand at the banking office, such demand note so payable is equivalent to a check, except that the maker is not discharged for failure to present. *Indig v. Nat. City Bk.*, 80 N. Y. 106; *Ætna N. B. v. Fourth N. B.*, 46 N. Y. 88; *Thatcher v. Bank*, 5 Sand. 130.

By usage, and independently of usage, a bank can debit its customer in account with the amount of his overdue note which it has discounted. This must result from the relation of debtor and creditor. *Bk. v. Hughes*, 17 Wendell, 94; *Marsh v. Bank*, 34 Barb. 298; *Ex parte Howard Nat. Bk.*, 2 Lowell, 487.

GARNETT, J. The first telegram from Haynes, Gordon & Co. to appellee was either a mere application for information or a request for acceptance. If the former, appellee is not estopped to deny its liability, because the reply stated the truth and appellant was not injured thereby; neither did he purchase the drafts (or checks) on the faith of such reply. Treating the telegram, however, as a request to accept payable on the following Monday, the reply of the bank can not be regarded as a compliance with the request. There is a distinct implication in the words "Drafts named are good now," that the bank would not undertake to answer for the state of Snyder's account beyond the moment when its telegram was sent. Myers did not regard it as an acceptance payable Monday, else he would not have demanded payment the Saturday previous. But his counsel argues that the reply of the bank was equivalent to writing "good" or "accepted" on the face of the paper. If so, the bank at once became the principal debtor, and was bound to pay whenever the paper was presented. Appellant did not consider that he had secured any such undertaking from appellee, but regarded it purely as a race of diligence. An acceptance is a contract, and does not differ from other contracts in the essential requirement of a meeting of minds. A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a draft, or

pay a check, only on presentment. One relying on a telegram as an acceptance, should see to it that the language used will, at least, fairly bear the meaning. *Rees et al. v. Warwick*, 3 Eng. C. L. 467.

The case at bar is easily distinguishable from *Coffman v. Campbell*, 87 Ill. 98. There the defendants plainly said they would pay the draft, but added a phrase which did not explain itself. Having promised to pay in positive terms, the court held that if they desired to add a condition it should have fully expressed it. But here the intention to accept is not expressed; on the contrary, as we have shown, appellee's telegram plainly implied that it would not agree to hold Snyder's balance for *any time* to meet the paper held by Myers.

Appellant contends that the making and delivery of the checks operated as a transfer to him of so much of Snyder's deposit as was required to pay them, and that after receipt of the telegrams the bank could not pay to itself a debt due from Snyder, and thereby exhaust the fund which had been appropriated to the payment of the checks. For that doctrine reliance is placed on several cases decided by the Supreme Court of this State, but the only one which appears to have serious importance is *Bank of America v. Indiana Banking Co.*, 114 Ill. 483. That was a contest between a check-holder and an attachment creditor. A garnishee summons was served on the bank after the check was delivered, and before the bank had notice of the check. After service of the garnishee process the bank paid the check, and the court held the payment rightful. But it is well settled that an assignment of a chose in action protects the assignee against subsequent garnishment of the debtor by the creditor of the assignor, if the defense is properly presented. *Drake on Attachment*, Sec. 527.

In the case at bar the dispute is between two creditors, one of whom is a check-holder and the other the holder of a note payable at the same bank; it is equivalent to a contest between two check-holders. The sound doctrine in such cases is set forth in *Morse on Banks and Banking*, p. 266, as follows:

Vierling v. Horton.

“The rule with checks is, ‘first come first served.’ If payment is demanded at noon upon a check which the depositor’s unincumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer’s balance. This is no concern of the bank, not even if it has been informed that such checks have been drawn and will be presented for payment. Its perfectly simple duty is to pay in full each check presented, at the time of presentment, so long as the unincumbered credit of the depositor suffices to enable it to make such payments in full.” This rule meets our approval. Any other must lead to endless confusion.

Considering the merits of the respective claims we shall have no difficulty in holding the equity of the bank to be at least equal to that of Myers. There was no privity between them. Myers received his checks several days before Snyder made his deposit of \$5,000 in the bank, hence he could not have relied on that deposit at the time he paid Snyder for the checks. In a similar case, *First National Bank v. Pettit et al.*, 41 Ill. 492, the court said: “We do not see * * * upon what principle it [the bank] should be required first to pay a debt due from Allen [the depositor] to persons with whom it has had no transactions and who, if losers, are so by no fault of the bank. The debt due from Allen to it is as meritorious as that due the appellees,” the holders of the checks. The judgment is affirmed.

Judgment affirmed.

FRANK C. VIERLING

v.

OLIVER H. HORTON.

27	263
177	293

Negotiable Instruments—Note—Consideration—Subscription to Mission Church.

A promissory note given in payment of a subscription, or to satisfy a promise of a subscription, to the funds of a mission church, is upon a valuable consideration. If such note is discounted and the proceeds used for the purpose for which the subscription was given, the maker can not defend on the ground of failure of consideration.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. GEORGE R. GRANT, for appellant.

Messrs. HOYNE & FOLLANSBEE, for appellee.

MORAN, P. J. This action was commenced by appellee against appellant to recover on a promissory note for \$416, made by appellant and payable to the order of Samuel A. Kean, and which was duly assigned to appellee. The case was submitted to the court without a jury, and the finding was against the appellant for the amount of the note and interest thereon to the date of the judgment. The defense of the appellant was that there was no consideration for the note, and that appellee held said note merely as trustee.

It appeared from the evidence that Kean was soliciting subscriptions in behalf of what was known as the Halsted Street Mission, and that appellant promised to give five hundred dollars to the fund. He gave his note for that amount and afterward paid \$100 in cash, and took up the first note by giving the note in suit. The money was used for current expenses of the mission; Kean discounted the note at the bank of Preston, Kean & Co., and expended the proceeds in support of the mission.

It has been repeatedly decided that where one promises a subscription for the support or erection of a church, school or other religious, educational or charitable institution, and money is advanced by another on the faith of such promise or subscription, an action may be maintained to recover the amount so promised or subscribed.

Reich v. Berdel.

It follows that a promissory note, given as a subscription or to satisfy a promise thus made, is given on a valuable consideration, and that if the note is discounted and the proceeds used for the purpose for which the subscription is given, the maker of the note can not defend against it on the ground that no consideration moved to him for its execution. *Byron v. Cain*, 25 Ill. 263; *McClure v. Wilson*, 48 Ill. 356; *Pratt, Adm'r, v. Trustees*, 93 Ill. 475.

There is some conflict in the evidence on the point as to whether the promise was made, but we think the evidence clearly supports the finding of the court.

There was no error in rendering the judgment, and it must therefore be affirmed.

Judgment affirmed.

MICHAEL REICH

v.

ADELAIDE N. BERDEL ET AL.

Injunctions—Dissolution—Damages—Appeal—Record.

A judgment for damages assessed on the dissolution of an injunction, can not be supported on appeal, unless the evidence authorizing it is preserved in the record.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. BLUM & BLUM, for appellant.

Mr. E. A. SHERBURNE, for appellees.

MORAN, P. J. This is an appeal from a decree assessing damages on the dissolution of an injunction which had been sued out by appellant. The record shows only a suggestion

of damages, and that the damages were assessed at \$164.75. It does not appear that the court heard any evidence showing the nature or extent of the damages nor how they arose.

It has been repeatedly held a judgment for such damages can not be supported on appeal, unless the evidence authorizing the judgment is preserved in the record. There is nothing whatever to support this decree for damages, and it must therefore be reversed and the case remanded.

Reversed and remanded.

MATTIE E. GOSSETT

v.

UNION MUTUAL ACCIDENT ASSOCIATION.

27 266
54. 469

Pleading—Mutual Accident Association—Action on Certificate of Membership—Declaration—Sufficiency of—Uncertainty—Demurrer.

1. A copy of an instrument is no part of the declaration to which it is attached.

2. In an action on a certificate of membership in a mutual accident association, it is *held*: That the demurrer to the declaration, containing the common counts, was improperly sustained; that allegations in two of the special counts that the membership in the association was sufficient to make the amount named in the certificate by the payment of two dollars each, reduced to certainty that which would have been uncertain; and that the special counts are sufficient.

[Opinion filed September 18, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. H. C. IRISH, for plaintiff in error.

"The defendant voluntarily issued its policy. It received the premium, and Baily, fully, so far as appears, performed all his contract required him to do. So far as he is concerned, the contract is an executed one." *Benefit Association v. Blue*, 120 Ill. 121, 128.

Where a contract has been fully executed, and nothing remains to be done but the payment of money, which the defendant is to do, the plaintiff may recover in *indebitatus assumpsit* under the common counts. *Lane v. Adams*, 19 Ill. 167; *Thomas v. Caldwell*, 50 Ill. 138; *Johnson v. Glover*, 19 Ill. App. 584.

The method by which defendant proposes to raise the money wherewith to pay this debt is no part of the real contract, and does not concern plaintiff, except, in a certain contingency to be shown by the defendant, her recovery may be reduced in amount.

No act is required of either the insured or plaintiff in connection with the raising of the money, and they can not in any way interfere therewith. The contract is fully executed, and *assumpsit* will lie.

Assumpsit upon policies of insurance (and on the assessment plan) are common in practice in this State. *Pro. Life Ins. Co. v. Palmer*, 81 Ill. 88; *Ben. Ass'n v. Hoffman*, 110 Ill. 603; *Nat. Ben. Ass'n v. Jackson*, 114 Ill. 533; *Cov. Ass'n v. Spies*, 114 Ill. 463; *Ben. Ass'n v. Blue*, 120 Ill. 121.

Whether an assessment will realize the full amount named in the certificate is matter of defense. *Elkhart Aid Ass'n v. Houghton*, 103 Ind. 266; *Excelsior Ass'n v. Riddle*, 91 Ind. 84; *Lnders v. Hartford Ins. Co.*, 4 McCrary, 149; S. C., 12 Fed. Rep. 465; *Burland v. N. W. Ben. Ass'n*, 48 Mich. 424; *Neskern v. N. W. Endow. Ass'n*, 30 Minn. 406; *Suppiger v. Cov.*, etc., *Ass'n*, 20 Ill. App. 597.

Messrs. JOHN M. HAMILTON and CHAS. C. GILBERT, for defendant in error.

It is an elementary principle of law that actions in *assumpsit* for money can only be maintained where the amount to be received is certain, or is capable of being made certain, by the evidence. Under this contract it would be impossible for a court or jury to fix a definite amount in advance of an assessment without violating the terms of the contract. The amount to be paid under the terms of this certificate can not be ascertained in a suit at law, but only by a proceeding in equity to compel

the levy and collection of an assessment, and therefore an action at law can not be maintained. In every Illinois case cited by counsel for appellant either this point was not raised or the policy provided for the payment of a certain sum absolutely, although it was to be raised by assessment. But the precise question in this case has been several times recently decided by the Supreme Court of Iowa, and the doctrine is firmly established that a suit at law on such a contract of insurance can not be maintained. *Ranisbarger v. Union Mut. Aid Ass'n*, 33 N. W. Rep. 626; *Bailey v. Mut. Ben. Ass'n*, 27 N. W. Rep. 771; *Newman, Trustee, v. Covenant Mut. Ben. Ass'n*, 33 N. W. Rep. 662.

GARNETT, J. The plaintiff in error filed her declaration in assumpsit against defendant in error, on a certificate of membership, or policy of insurance.

There were three special counts in addition to the common counts. The first special count declared upon a certificate of membership issued to Thomas F. Gossett, alleging the defendant agreed, for a valuable consideration named, to pay to plaintiff the principal sum (not to exceed \$5,000), represented by the payment of \$2 by each member of the defendant association, as provided in the by-laws thereof, in case of the death of said Thomas by external, violent and accidental means.

The second count is similar to the first, except that it describes the instrument sued on as a policy of insurance. The third count declares upon a policy of insurance for \$5,000, which, for aught we can see, is an ordinary accident policy. In all three of these special counts there are sufficient allegations of the death of the assured in the manner specified in the policy, proofs of death and demand of payment; and in the first and second counts allegation is made of a membership in said association sufficient in number so that a payment by each member of two dollars would produce \$5,000.

A copy of the certificate sued on was attached to the declaration. The defendants filed a general demurrer to the declaration, which was sustained by the court. Judgment was rendered for the defendant on the demurrer, and plaintiff seeks to reverse the same by this writ of error.

That the court erred in sustaining the demurrer to a declaration which included the common counts, is too plain to need argument or citation of authority. We can only account for the action of the court by supposing the counsel to have confined their argument to the special counts, as they have done in this court. In his brief, the counsel for defendant makes two erroneous assumptions. He takes it for granted that the copy of the instrument attached to the declaration is a part of the declaration. That is a mistake. See *Bogardus v. Trial*, 1 Scam. 63; *Harlow v. Boswell*, 15 Ill. 56.

Therefore the third special count is entirely sufficient on its face. The other error committed by counsel is in supposing that the certificate sued on provides that the member "is entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of \$5,000, which sum, *or such part thereof as may be collected for that purpose by the payment of one regular assessment of two dollars from each member of the association, liable at the date of the accident*, shall, within sixty days after sufficient proof," be paid to the beneficiary.

We find no such provision in any of the special counts, or in the copy of the instrument sued on. But the entire argument for the defendant is based on these two erroneous assumptions. The contract set out in the first and second counts is to pay to the plaintiff the principal sum (not exceeding \$5,000) represented by the payment of \$2 by each member in the association. That is certain which can be rendered certain. The extent of the defendant's liability is measured by \$2 for each member, the total not to exceed \$5,000. The first and second counts alleged that the membership was sufficient to make \$5,000 by a payment of \$2 each. They thereby reduced to certainty that which would have been uncertain had no such allegation been made. *Neskern v. N. W. End. & Leg. Ass'n*, 30 Minn. 406; *Kansas Protective Union v. Whitt*, 14 Pacif. Rep. 275. The special counts are each sufficient on their face.

For the errors herein indicated the judgment of the Circuit Court is reversed and remanded.

Reversed and remanded.

CHARLES J. HUSTIS ET AL.

V.

H. S. PICKANDS ET AL.

Brokers—Purchase of Mining Stock—Action for Commissions—License—Ordinance—Pleading.

1. Brokers in mining stocks are embraced within an ordinance of the city of Chicago, which renders it unlawful for any person to exercise, within the city, the business of a money changer or banker, broker or commission merchant without a license therefor.

2. A broker who has purchased mining stock for a third party, in violation of such ordinance, without a license, can not maintain an action for commissions.

[Opinion filed Sept. 18, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action by plaintiffs in error against the defendants in error to recover for commissions alleged to have been earned by the plaintiffs while acting as brokers, within the corporate limits of the city of Chicago, for the defendants, in the purchase of certain mining stocks.

The defendants filed the plea of the general issue and affidavit of merits, also a special plea, to which the plaintiffs interposed a demurrer. The court overruled the demurrer, whereupon, the plaintiffs electing to abide by their demurrer, final judgment was rendered, from which plaintiffs bring error to this court, and assign for error the overruling of said demurrer. The said special plea is as follows:

“And for a further plea in this behalf the said defendants, by Frederic Ullmann, their attorney, say that the said plaintiffs ought not to have maintained their aforesaid action thereof against them, because they say that, at the time of the making of the said several supposed promises and undertakings in said declaration mentioned, if any such were or was made,

27	270
41	147
27	270
46	362
27	270
50	181

the plaintiffs were carrying on and exercising, within the corporate limits of the city of Chicago, in said Cook County, to wit, at the county of Cook, the business of brokers by the co-partnership name and style of Hustis, Conglan & Ray; and the defendants in fact aver that, at and prior to the time aforesaid, there was and had been, and from thence hitherto has been and still is in full force and effect in said city of Chicago, in the county aforesaid, an ordinance theretofore duly passed by the city council of said city, duly approved by the mayor of said city, and duly published according to law, in the words and figures as follows, to wit:

"Be it ordained by the City Council of the City of Chicago:

"SECTION 1. It shall not be lawful for any person to exercise within the city the business of a money changer or banker, broker or commission merchant, including that of merchandise, produce or grain broker, real estate broker and insurance broker, without a license therefor.

"SECTION 2. A merchandise, produce or grain broker is one who, for a commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce or grain belonging to others.

"SECTION 3. A real estate broker is one who, for commission or other compensation, is engaged in the selling of or negotiating sales of real estate belonging to others, or obtains or places loans for others on real estate.

"SECTION 4. An insurance broker is one who is engaged in procuring, or places insurance on buildings, vessels or other property for others.

"SECTION 5. There shall be collected annually, for every license granted for any banker, the sum of \$100, and there shall be collected annually, for every license granted for any broker, including any merchandise, produce or grain broker or commission merchant, or money changer or broker, the sum of \$25; and there shall be collected annually, for any license granted any real estate broker, the sum of \$25; and there shall be collected annually, for every license granted for any insurance broker, the sum of \$25.

"SECTION 6. That any person violating any provision of

this ordinance shall be subject to a penalty of not less than \$25 nor more than \$100 and to the same penalty for any subsequent violation thereof."

"And the defendants further aver that, at the time of the making of the said several supposed promises and undertakings in said declaration mentioned, the said plaintiff had not obtained, and did not then, nor theretofore nor thereafter have the license specified in said ordinance or any other license authorizing them, or either of them, to exercise said business so by them carried on as brokers within the city of Chicago, in said county of Cook; but, on the contrary thereof, said plaintiffs then were, theretofore had been, and still are exercising the said business as brokers within the said city of Chicago, without having obtained any license therefor, and in violation of the provisions of said ordinance.

"And these defendants further aver that the sum or sums of money sought to be recovered in this action by said plaintiffs from these defendants are alleged to be due to said plaintiffs from these defendants for commissions or compensation alleged to have been earned by said plaintiffs as brokers in purchasing certain stocks for these defendants, and at their alleged request within the said city of Chicago, at the time aforesaid.

"And this the defendants are ready to verify, wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them," etc.

Mr. JESSE B. BARTON, for plaintiffs in error.

Plaintiffs in error insist, first, that the business of stock broker is not included in the ordinance, and that, therefore, plaintiffs were not required to take out a license; second, that the question of whether or not plaintiffs had a license, even though positively required to take out one, was wholly between them and the municipality, and could not in any way affect the relations between plaintiffs and defendants. There being nothing unlawful in any of the occupations enumerated in the ordinance, either in themselves or as the result of statutory inhibition, there is nothing in the nature of the business sought to be licensed which would vitiate the contract between

the broker and his customer under which the broker could claim remuneration for his services.

All enactments should be construed according to their intention, and the intention of this ordinance is manifest. It aims to exact a license fee from every banker and every money changer, whose occupations are so well known as to require no definition, and from every merchant, produce or grain broker, every insurance broker and every real estate broker, and that no guilty man may escape, it was made clear by sections 2, 3 and 4, what was intended to be included. Had it been intended to require of a stock broker a license, his business would have been more particularly described than the others, for a stock broker is a *rara avis* in Chicago, while the others are more numerous than the followers of any other business in the city.

Assuming, however, that plaintiffs in error violated the provisions of the ordinance when they acted as brokers in buying mining stocks for the defendants, yet they are entitled to recover their brokerage from the defendant. The statute authorized the city to tax, license and regulate, and if by the ordinance it has taxed and licensed this particular business, it has not declared it unlawful to pursue it without paying the tax and taking out the license, and is powerless to make it unlawful even if it tried.

It is absurd to say that the same act committed in the same manner, with the same publicity, in the same commonwealth, is unlawful on one side of a municipal boundary and lawful on the other side in any sense in which the word unlawful can be used when an act so characterized would vitiate a contract based on the act. While it may be said that the authorized ordinance of a municipality has the same effect as an act of the legislature and be good as a general principle of law, yet the municipality can not exceed the powers of the legislature and the legislature could never say that the same consideration for a contract was in one place in the State unlawful and the contract void, and in another place was lawful and the contract valid. The following cases hold that a penalty-imposing ordinance in no respect enters into the civil relations between the

person liable to the penalty for an infraction of the terms of the ordinance and other persons: *R. R. Co. v. Ervin*, 89 Pa. St. 71; *Henry v. Sprague*, 11 R. I. 456; *Chambers v. Trust Co.*, 1 Disney, (Ohio), 336; *Van Dyke v. Cincinnati*, 1 Disney, 532; *Jenks v. Williams*, 115 Mass. 217; *Peck v. Austin*, 22 Texas, 261; See *Royall v. Virginia*, 116 U. S. 572; *Insurance Co. v. Polleys*, 13 Pet. 157.

There is yet another reason why this plea is bad, and that is on account of a very wise and just distinction laid down in the English case of *Smith v. Mawhood*, 14 M. & W. 452, which is, that when it is the intention solely of the legislative body to make the act illegal and to prohibit it, then the act can not be a good consideration for a contract; but when the sole or main object is to raise revenue, the act is not illegal in the sense that a contract based upon it is void, and can not be enforced.

Mr. FREDERIC ULLMANN, for defendants in error.

An action for commissions or brokerage for negotiating the sale of stocks belonging to other parties can not be maintained by brokers who have not obtained a license to do business as brokers under the city ordinance set out in the plea. The weight of authority is that the imposition of a penalty implies a prohibition.

"When an incorporated town or city has been invested with power to pass an ordinance by the legislature for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation, in pursuance of the act creating the corporation, has the same force and effect as a law passed by the legislature, and can not be regarded otherwise than a law of and within the corporation." *Mason v. Shawneetown*, 77 Ill. 533, 537; *Wright v. C. & N. R. R.*, 7 Ill. App. 438; *Hopkins v. Mayor of Swansea*, 4 Mills & W. 640; *Heland v. City of Lowell*, 3 Gray, 408.

Where a statute enacts a penalty for carrying on a particular business without a license, no action can be maintained on a contract made by one who violates the statute, even though the statute contains no prohibition. *Bensley v. Bignold*, 7

Cravener v. Hale.

Eng. Com. Law, 188; Downing v. Ringer, 7 Mo. 585; *Ætna Ins. Co. v. Harvey*, 11 Wis. 412; *Williams v. Cheney*, 3 Gray, 222; *Jones v. Smith*, 3 Gray, 500; *Cincinnati Mut. Health Assurance Co. v. Rosenthal*, 55 Ill. 85; *Fridley v. Bowen*, 87 Ill. 151; *Penn v. Bornmann*, 102 Ill. 523; *Banking Co. v. Rautenberg*, 103 Ill. 460; *Farrow v. Vedder*, 19 Ill. App. 305; *Cope v. Rowlands*, 2 M. & W. 149; *Johnson v. Hulings*, 103 Pa. St. 498.

MCALLISTER, J. The ordinance set out in the special plea has been adjudged to be legal and valid. *Brann v. Chicago*, 110 Ill. 186. While the language of the ordinance is somewhat peculiar, yet we are inclined to the opinion that it was intended to and does fairly embrace and apply to brokers in stocks. If we are right in that conclusion then it follows, as we think from the doctrine of the prevailing current of authorities, that the plaintiffs, being unlicensed as brokers at the time of the purchase by them as such, of the stock in question, their act was unlawful and they can not recover commissions, so that the plea must be held to be good and the judgment affirmed.

Judgment affirmed.

AMOS W. CRAVENER

v.

PRESCOTT G. HALE.

27	275
54	283
97	275
154	608

Contract to Sell Lands—Condition—Construction—Abstract of Title—Rescission.

1. Where a vendor, by agreement, has undertaken to furnish the vendee "an abstract of title showing good title and power and authority to sell and convey," the deposit made by the latter to be returned and the contract determined in case of failure to show good title, and the abstract furnished shows such title, although in fact it is in dispute, the vendor can not place the vendee in default by the tender of the deed.

2. In the case presented, it is held: That the contract is to be construed

most strongly against the vendor; that he did not bring himself within the condition authorizing a rescission; and that he could not rescind for non-performance by the vendee, as he was not himself in a condition to perform.

3. As a general rule a contract can not be determined or rescinded by a party to it unless he is in a position to demand a specific performance.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. H. T. & L. HELM, for appellant.

Mr. JAMES S. MURRY, for appellee.

MORAN, P. J. On December 24, 1886, a contract in writing was entered into between appellant and appellee, as follows:

"Articles of agreement, made this 24th day of December, A. D. 1886, between Amos W. Cravener, party of the first part, and Prescott G. Hale, as trustee under the last will and testament of Matilda Hale, deceased, party of the second part.

"Witnesseth: That if the party of the first part shall first make the payment and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the second part covenants and agrees at the time hereinafter stated to convey and assure to the said party of the first part in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the lot, piece or parcel of ground situate in the County of Cook and State of Illinois, known and described as the north one-half ($\frac{1}{2}$) of the northwest one-quarter ($\frac{1}{4}$) of section twenty-three (23), township thirty-eight (38) north, range thirteen (13), east of the third principal meridian, except the east fifty (50) feet thereof, heretofore taken for a railroad right of way and subject also to all streets, alleys and highways, and subject also to all taxes, assessments or other impositions legally levied or imposed upon said land subsequent to the year A. D. 1886.

"And said second party also agrees to furnish to said party

on or before January 10, 1887 (or as soon thereafter as the probate proceedings in the estate of Matilda Hale, deceased, can be finally settled and the abstract of title continued to show such settlement), an abstract of title showing good title and power and authority to sell and convey in said second party as trustee as aforesaid.

“And the said party of the first part hereby covenants and agrees to pay to the said party of the second part the sum of \$24,000, in the manner following, to wit: \$500 cash down upon the signing of this agreement, and within ten days after said second party shall have furnished to said first party said abstract of title as above provided, said first party shall pay to said second party the further sum of \$3,500, and will make and deliver to him his four promissory notes dated January 1, 1887, payable to the order of said second party at the Merchants' Loan and Trust Co., Chicago, Illinois; one for \$3,000, payable April 1, 1887; one for \$5,000, payable one year after date; one for \$6,000, payable two years after date, and one for \$6,000, payable three years after date, all with interest from date at the rate of six per cent. per annum, payable semi-annually, and at the same time will make, execute, and deliver to said second party a mortgage on the premises above described, securing said four above-mentioned promissory notes, and at the same time the said second party (the first party having performed his contract) will execute and deliver to said first party the warranty deed aforesaid. In case the abstract of title to be furnished as aforesaid, does not show a good title as herein stated, then the five hundred dollars (\$500) this date paid thereon shall be returned to said first party and this contract determined.

“In case of a failure of said first party to make either of the payments or to perform any of the covenants on his part made and entered into hereby, then said contract shall, at the option of said second party, be forfeited and determined, and said second party shall retain all payments made as his agreed and liquidated damages. It is hereby agreed that all the covenants and agreements herein contained shall extend to, and be obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

' AMOS W. CRAVENER, [SEAL.]

"PRESCOTT G. HALE, [SEAL.]

"Trustees under the last will and testament of Matilda Hale, deceased."

After the making of said contract appellee proceeded to close up the proceedings in the Probate Court, and on or about January 6, 1887, his final account was approved by said court, and appellee was discharged as executor and the estate closed. The abstract of the land mentioned in the contract was extended by the appellee so as to show the final settlement of the estate, and delivered on January 14, 1887, and as soon as it was completed by the abstract makers, to the agent of appellant.

On January 8, 1887, Martin C. Hale, Douglass R. Hale and Franklin M. Hale, three of the children and heirs at law of said Matilda Hale, deceased, filed their bill in chancery in the Circuit Court of Cook County against appellee (and other heirs) alleging, among other things, that the said last will of Martha Hale, deceased, was not the last will of said deceased, and praying, among other things, that the same might be set aside.

The abstract which was delivered to appellant by appellee on January 14, 1887, did not show the commencement of said suit in chancery, though it did show that the same parties who filed said bill objected on January 9, 1887, in the Probate Court, to the discharge of appellee as executor, on the ground, as they alleged, that said will, was not the last will of said Matilda Hale.

The abstract furnished to appellant was submitted by him to his solicitor for examination, and on January 20, 1887, said solicitor sent to appellant the following opinion of title:

"*Dear Sir:*—I have given the abstract of title to the land—N. $\frac{1}{2}$, N.W. $\frac{1}{4}$, Sec. 23, T. 38, 13, in Cook County, Ills.—a careful examination.

"It is my opinion that the title stood at death of Matilda Hale in her, and that she had good right to convey the same, or to devise the same by will. That under the will, if the

same is in all respects valid, Prescott G. Hale, as her trustee, has full right to sell and convey the same, and that a deed from said Prescott G. Hale and her other heirs (none being under disability) will give a good title in any event. Yours,

“H. T. HELM.”

Neither appellant nor his solicitor knew of the filing of the bill attacking the will till after the date of said opinion. Some negotiations took place between the parties with reference to some arrangement by which the chancery suit might be disposed of and the title passed, but nothing was accomplished; and on March 9th, appellant filed a petition to be made a party defendant in said suit in the Circuit Court, and set out in his petition a copy of said contract for the purchase of the land in controversy, and an order was made by the court making said appellant a co-defendant, with leave to answer.

Appellant did not make the payment of money required by the contract to be made within ten days of the delivery to him of the abstract, and did not make and deliver the promissory notes or mortgage provided for in the contract. About May 7, 1887, appellee was offered \$28,500 for the property in controversy, and, through his attorney, answered that he could not sell till he had gotten rid of the contract with appellant, which he proposed to do. On May 27, 1887, appellee tendered to appellant a deed of the premises described in the contract, and which was in form according to the contract, and demanded that appellant should pay the money then due under the contract, and should execute and deliver the notes and mortgage according to the terms of the contract, but appellant refused to accept said deed, and to make the payments or execute the notes. Whereupon appellee tendered to appellant \$512.75, being the \$500 which appellant paid on the contract with interest thereon from December 24, 1886, when it was paid; but appellant refused to receive said tender or to accept said money, and thereupon appellee declared the said contract determined, and demanded from appellant the abstract of title. The next day appellant went to the office of appellee's solicitor and there tendered to appellant the money due upon the contract, and offered to receive the deed and execute the mortgage and

notes, provided appellee would procure said chancery suit to be dismissed; but appellee declined, for the reason that he could not get the suit dismissed without the payment of a large amount of money.

On June 4, 1887, the bill in this suit was filed, showing that appellant refused to discharge said contract, and that by his filing a copy thereof in said suit in the Circuit Court it had become a cloud on the title of appellee, and that appellant claims a conveyance of said premises, but insists that said chancery suit should be settled, or caused by appellee to be dismissed, and praying that said contract be declared null and void, and be removed as a cloud on appellee's title, and be ordered delivered up and canceled. On the hearing, the facts above set out appeared from the pleadings and proofs of the respective parties, and upon said facts the court entered a decree granting the relief prayed for in appellee's bill.

The correctness of the decree depends upon the question whether, under the terms of the contract and the facts stated, appellee had a legal right to rescind the contract and tender back the deposit paid by appellant. The terms of the contract obligated appellee to convey and assure to appellant a fee simple title to the premises described, and to discharge such obligation appellee was bound to convey a marketable title, that is, a title not subject to such reasonable doubt as would create a just apprehension; one that would be regarded as merchantable, so that persons of reasonable prudence and intelligence would be willing to take it and pay the fair value of the land. *Parker v. Porter*, 11 Ill. App. 602; *Brown v. Cannon*, 5 Gilm. 174; *Snyder et al. v. Spaulding*, 57 Ill. 480.

It is very plain that the title to the land mentioned in the contract was not in merchantable condition at the time appellee tendered the deed to appellant and demanded the performance of the contract, and appellee not being able to convey such a title as would satisfy the covenants in his agreement, could not put appellant in default by tendering the deed and demanding performance of the contract. Appellant had not agreed to accept such a title as was offered to him, and no prudent man would do so while subject to the uncertainty cast

upon it by the filing of the bill. Indeed, it is frankly admitted by counsel for appellee in his brief filed in this court, that appellant could not be compelled to accept any other than a good title, and he states that appellee has never insisted that appellant was bound to accept the title in view of the litigation that was developed after the contract was made. If appellant was not put in default by the tender of the deed, then appellee had no right to rescind the contract on the ground that appellant refused to perform it.

It is contended by appellee that the conditions in the contract authorized him to rescind, if the title was not found good.

The condition is: "In case the abstract of title to be furnished as aforesaid does not show a good title, as herein stated, then the \$500 this date paid thereon shall be returned to said first party, and this contract determined." Now, it is obvious that any party who seeks to determine his contract by availing himself of a condition therein contained providing for such determination, must bring himself strictly within the terms of such condition. The condition is not to be liberally construed, nor enlarged to include facts or circumstances not within its terms, but on the contrary, is, in contracts for the sale of lands, to be taken most strongly against the vendor. In *Greaves v. Wilson*, 25 Beav. 290, which was a bill for specific performance in a case in which vendor sought to determine a contract under a condition contained in it, the court said: "The mode in which these conditions must be construed is explained in all the cases upon the subject. They must be construed, like every other instrument, most strictly against the person who frames them, because the vendor alone can be the sole judge of the necessity or propriety of making such conditions before he offers the property for sale. In addition to that, it is to be borne in mind that a person who offers property for sale becomes subject to certain duties, in the character of vendor, and that he does not get rid of them by special conditions of sale." It is further said in the same case, that "A vendor can not make use of a condition to rescind a contract for the purpose of getting rid of the duty which attaches to him upon the rest of the contract, of mak-

ing out a title," and to this effect is *Page v. Adams*, 4 Beav. 259. In *In re Jackson*, 14 L. R. Ch. Div. 851, the rule laid down in *Greaves v. Wilson*, *supra*, was followed in a case where the condition provided, among other things, that objection should be made within fourteen days from the delivery of the abstract, and if none were made within the time the title was to be deemed accepted, and if the purchaser should insist on any objection which the vendor should be unable, or on the ground of expense, should decline to remove, then the vendor should be at liberty to rescind the contract by notice, unless the purchaser should, by notice, withdraw the objection, and upon rescission the purchaser should receive back his deposit.

The abstract delivered did not show the real state of the title, and after the title as shown by abstract was approved, it was discovered that there was an equitable mortgage on the leasehold of which the vendor was ignorant. The purchaser insisted that this should be discharged and the vendor gave notice that he was unable and unwilling, on the ground of expense, to comply, and that he would rescind the contract unless the objection was withdrawn. The purchaser refused to admit the rescission and applied to the court, and it was held that there could be no rescission, as the objection did not come within the condition, not having been shown by the abstract, and that the charge upon the property should be cleared off by the vendor.

See, also, *Roberts v. Wyatt*, 2 Taunt. 268, where a condition in a contract of sale by which the contract was to be void in case the vendor could not deduce a good title, is construed by Lord Mansfield to give an option, not to the vendor, but to the purchaser, to avoid the contract for failure to deduce such good title.

Now, in view of this rule of strict construction as against the vendor, as illustrated by these cases, has appellee brought himself within the condition which he seeks to avail himself of to rescind this contract? He agreed to furnish to appellant an abstract of title showing good title and power and authority to sell and convey in himself, and provided a condition that, in case the abstract of title to be furnished did not

show a good title, the deposit should be returned and the contract determined. The abstract which he furnished showed a good title; therefore it is clear that, if nothing further had arisen to affect the title, appellee would have no right to rescind the contract under the condition. Facts existed not shown on the abstract furnished by appellee, which rendered the title not good, but the existence of such facts can not avail appellee as a basis of rescission, for the condition only authorizes rescission "in case the abstract to be furnished as aforesaid does not show a good title."

It will not do to suggest that the abstract, if perfect when delivered to appellant, would have failed to show the title good. Appellee took upon himself the duty of furnishing the abstract, and he furnished the one delivered as a compliance with his undertaking, and he can not allege his own error or default in order to bring himself within the condition, and accomplish a rescission. This case is not like the case of Hoyt v. Tuxbury et al., 70 Ill. 332, and Brizzolara et al. v. Mosher et al., 71 Ill. 41, cited and relied on by counsel for appellee. In the first of those cases the provision was that payments were to be made in a certain time "after the title had been examined and found good." In the second case the clause in the agreement was, "should the title to the property not prove good, then the payment to be refunded."

So in *Mauson v. Fletcher*, L. R. 10 Eq. 212, the condition was very broad, being, in effect, if any objection to the title be persisted in, the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit. The difference between the conditions and provisions of the contracts in those cases and that in the case under consideration is too obvious to require specification. Such cases establish no rule for the construction of this condition.

Our conclusion is that appellee could not rescind the contract under its terms, as he did not bring himself within the condition authorizing a rescission, and he could not rescind for non-performance by the appellant, because appellee was not himself in a condition to perform. As a general thing, a contract can not be determined or rescinded by a party to it

unless he is in a position to demand a specific performance. *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Howe v. Hutchinson*, 105 Ill. 501; *Johnson v. Pollock*, 58 Ill. 181.

The decree of the court, annulling the contract and directing its cancellation, can not be sustained, and the same will be reversed and the case remanded, with directions to the Superior Court to dismiss appellee's bill.

Reversed and remanded.

27 284
63 209

GEORGE E. WELLING

v.

ANTHONY SCHILLER.

Sales—Value—Fraudulent Representations—Action on Note—Failure of Consideration—Pleading.

1. General representations made by a vendor as to the value of property he offers for sale, will not be regarded as evidence of a fraudulent intent except in extreme cases.

2. In an action on a promissory note given in payment for certain shares of the capital stock of a corporation, it is *held*: That the court below properly sustained a demurrer to special pleas of failure of consideration by reason of fraudulent representations, the allegations of fraud being insufficient to show failure of consideration.

[Opinion filed September 18, 1888].

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

This was a suit brought by Schiller as assignee against Welling as maker of a promissory note bearing date March 13, 1886, whereby the latter promised to pay to Albert Schenbeck the sum of \$500 ninety days after date, with interest.

The defendant pleaded the general issue and two special pleas. The first special plea was in substance as follows: *Actio non*, etc.

"That on March 13, 1886, one Albert Schenbeck sold and delivered to defendant fifty shares of stock of the Spitzer Patent Starch Company; that, in consideration thereof and of the representation concerning the same as thereafter mentioned, the defendant executed two promissory notes, one of which is the note forming said cause of action; that at the time of said sale and delivery, and before the execution and delivery of said notes to Schenbeck, the latter falsely and fraudulently represented to defendant that said Spitzer's Patent Starch Company was a corporation and would have a starch factory running in Chicago within thirty days from March 13, 1886; that said company would also extensively manufacture a certain paste and would realize large profits and gains from the sale thereof; that said stock was valuable and would become more valuable; that thereupon the defendant, upon the sole consideration of the transfer of said shares of stock and of said representations, which the defendant believed to be true and which the said Schenbeck knew to be false and fraudulent at the time they were so made, executed and delivered said note; that said shares of stock, at the time of such sale and representations, were worthless and of no value and have so remained ever since; that said company, within said thirty days, had no starch factory running, and has not had one running since; that said company never manufactured any of said paste, and has never realized any profits or gains from its sale of any starch; that the consideration upon which said note was made, has wholly failed; that the said note was assigned to plaintiff after its maturity." Plea concludes with verification, and prays judgment, etc.

The second special plea was like the first except that it averred that the assignment of the note to plaintiff was without consideration and not *bona fide*.

To the first plea the plaintiff filed a general, to the second a special demurrer, assigning for cause that it was double.

The court sustained both demurrers, and the defendant electing to abide by his pleas, the cause was tried upon the general issue and plaintiff had judgment, upon which defendant brings error to this court, assigning for error said ruling upon the demurrers.

Mr. B. M. SHAFFNER, for plaintiff in error.

Messrs. ELLIS & MEISELBAR, for defendant in error.

MCALLISTER, J. The only question involved in this case is the sufficiency of one or both of the special pleas, as pleas of failure of consideration. Unless the matter averred amounted to an express warranty as respected the shares of stock, or a fraudulent misrepresentation of some definite, material fact relating to the sale thereof, neither plea was good.

It is manifest that neither plea sets up an express warranty. The only supposed misrepresentation as to a definite matter of fact, is based upon the averment that Schenbeck, the seller of the shares and payee in the note, represented that the stock was valuable and would become more valuable, whereas in fact it was worthless and he knew it.

The general rule, as to such misrepresentations constituting such fraud as may be the basis of an action for deceit, are collated in 3 Wait's Actions and Defenses, p. 435, with the authorities in support of them. It is there said: "General representations made by a vendor as to the value of property he offers for sale, or as to the price he has been offered for it, will not, excepting in extreme cases, be regarded as evidence of a fraudulent intent. One who relies upon such assertions, made by a person whose interest so readily prompts him to invest the property with exaggerated value, does so at his peril and must take the consequences of his own imprudence. *Manning v. Albee*, 11 Allen, 520, 522; *Curry v. Kayser*, 30 Ind. 214; *Ellis v. Andrews*, 56 N. Y. 83; *Dimmock v. Hallett*, L. R. 2 Ch. App. 26; *Anderson v. Hill*, 2 Sm. & M. (Miss). 679."

To which may be added *Noetling v. Wright*, 72 Ill. 390; *Medbury v. Watson*, 6 Met. 259; *Davis v. Meeker*, 5 Johns. 354; *Bump's Kerr on Fraud*, p. 82 *et seq.*

The pleas, neither of them, set out the transaction of the sale of the shares of stock otherwise than as an executed sale of a specific, ascertained subject-matter. It does not appear that the shares were sold as being of any particular description; that the corporation issuing them had not and never had any

Story v. Carter.

capital; nor is it averred that the certificates for the shares were spurious. *Torrey v. Buck*, 1 Greene Ch. (N. J.) 366; *Forbes v. Pausinsky*, 14 Ill. App. 1, and books there cited; *Mida v. Geissman*, 17 Ill. App. 212.

We think the pleas were each of them substantially defective and for that reason affirm the judgment.

Judgment affirmed.

HAMPTON L. STORY ET AL.

v.

THOMAS CARTER.

Sale—Evidence—Order—Subsequent Conversation—Agency—Immaterial Issue—Instructions.

1. In an action to recover for a bill of lumber delivered upon a written order, evidence of a subsequent conversation tending to prove an agreement touching a detail of the transaction as to which the written order was silent, is admissible.

2. Where a witness testifies that he acted as the agent of the plaintiff in making a sale, the question whether the property sold belonged to him, is immaterial.

3. It is proper to refuse an instruction on an immaterial issue, or one that has no basis in the evidence.

[Opinion filed September 18, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. ROBERT VAN SANDS, for appellants.

Mr. GEORGE SPARLING, for appellee.

Per Curiam. This action was brought to recover for a bill of lumber sold by appellee to appellants. The case was tried by a jury and a verdict and judgment was rendered against appellant for \$503.40. On this appeal it is urged that

the court committed error in allowing a witness who sold the lumber to testify that, after a written order for the lumber had been given, a conversation was had in which the method of inspection of the lumber was agreed upon. We think there was no error in allowing a subsequent conversation tending to prove an agreement as to a detail of the transaction as to which the written order was silent.

Appellants asked an instruction in substance, that if the jury believed that the lumber belonged to the witness who made the sale and not to the plaintiff in the suit, they should find for the defendants. The said witness testified on the trial that she acted as the agent of plaintiff in making the sale, and there was no evidence on which to base the instruction asked. The matter was not material to appellant, as the witness having testified to plaintiff's right to maintain this suit, would be estopped from thereafter making a claim against appellants for the price of the lumber.

There was a conflict of evidence as to the quality and value of the lumber, but the verdict of the jury has settled such conflict, and there is no such preponderance of evidence against the verdict as would authorize interference by the court. There is no error and the judgment will therefore be affirmed.

Judgment affirmed.

JOSHUA C. SANDERS

V.

HENRY E. SEELYE ET AL.

Attorneys—Lien on Papers—Fees—Contract—Construction of.

1. An attorney is entitled to a lien for a general balance of account on papers which have come into his hands in the course of his professional employment.

2. In the case presented, it is *held*: That certain letters and the action of the parties, constituted a contract for services in the Appellate Court only; that the appellees are entitled to a lien on the bonds in question for their fees for services in the Supreme Court; and that the evidence is sufficient to sustain the allowance by the court below.

Sanders v. Seelye.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

In 1874, David A. Gage filed his bill in the Circuit Court of Cook County against the Riverside Improvement Company, Joshua C. Sanders, Henry E. Seelye and others, praying that a release of a trust deed to Henry Greenebaum might be set aside, the trust deed foreclosed and for other relief. Sanders being the holder of 195 bonds secured by a subsequent trust deed to John N. Jewett, filed a cross-bill in the case to secure the benefits which he thought himself entitled to, as the owner of these bonds. The decree of the Circuit Court was adverse to Sanders, as well as to numerous other parties to the suit. He prayed an appeal to the Supreme Court, and filed there a transcript of the record. The appeal was dismissed. Afterwards, in 1881, Seelye, who was an attorney, was endeavoring to induce certain of the defeated parties to sue out a writ of error from this court. A correspondence on the subject ensued between him and Sanders, the latter then and ever since being a resident of New York. Sanders, to forward the plan, consented that the transcript filed in the Supreme Court might be withdrawn for use on the proposed writ of error, but refused all overtures to become one of the plaintiffs in error. September 14, 1882, Seelye wrote to Sanders that the cause was nearly ready for the Appellate Court, and suggested that his position was a good one, and that he should have some one to protect his interests. Two days later Sanders replied, saying he had received Seelye's letter about his securing counsel to attend to his interests in the case in the Supreme Court, but in substance declined to do so. Seelye wrote again on the 18th, and Sanders replied on the 21st, in which he said he thought the decision could not be sustained in the Appellate Court. On the 23d, Seelye wrote, making a definite proposition to take charge of the litigation for Sanders on certain terms, and saying if his proposition was agreed to, he should employ Herbert, Quick & Miller,

as the attorneys in the case. Sanders replied September 25th, saying: "In reply I would say, that the terms on which you propose to have my interests represented and protected in Supreme Court on appeal, are not so favorable as I was led to anticipate, and I can not accede to them. * * * I will pay for the printing necessary in the case, and I will pay attorney's fees in addition to make the sum \$500 if he is successful; if not successful \$300. That is, the total shall not exceed \$500 in case of success, and only \$300 if not successful. The bill for printing, not to exceed \$150, I will pay as soon as rendered. My proposal relates to a reversal in the Supreme Court. As to the other acts succeeding, different terms can be fixed."

This letter was never shown to Herbert, Quick & Miller, nor its contents made known to them. Seelye wrote Sanders on the same day, that he had taken the liberty of employing Herbert to prepare an argument for him, and would himself compensate him, until he heard from Sanders. When Seelye received Sanders' letter of September 25th, he had an interview with Herbert, Quick & Miller, and that firm wrote Seelye a letter, dated September 28th, saying: "We have considered your proposal in behalf of Mr. Sanders, that we represent his interests in the Appellate Court." They then proceed to explain at some length the situation of the case, and decline Sanders' offer. On the same day Seelye wrote to Sanders inclosing the letter from Herbert, Quick & Miller, and saying to him, "I submitted your proposition to Messrs. Herbert, Quick & Miller, and have just received the inclosed. After reading please return to me, etc." September 30th, Sanders writes Seelye that he is not much encouraged to engage in this free fight—that it looked too much like taking a leap into the dark, and closed by saying, "I can not change my proposal, and if not accepted, I will wait and look on, abiding events." Before there was any further correspondence, Herbert entered Sanders' appearance in the case in the Appellate Court, of which Sanders was informed by Seelye. Various letters passed between Seelye and Sanders from October 17, 1882, until June 27, 1883, in all of which

the case was referred to as pending in the Appellate Court, and Sanders was informed of successive moves in that court and that on account of Herbert's death, Miller had taken charge of the case. During that period a misunderstanding arose between them as to Sanders' liability for costs and he referred to and insisted upon standing by his letter of September 25, 1882. Seelye's reply stated: "Referring to yours of September 25th, I note the error in my recollection of your agreement," etc. On June 27, 1883, the Appellate Court affirmed the decree of the Circuit Court, and the same day Seelye notified Sanders of the fact, and asked him what they should do; that the parties in Chicago wanted to take it up, but that it rested largely with him to decide, and the expense would not be large. June 30, 1883, Sanders replied: "If the expense is not going to be great, I should be in favor of going up to the Supreme Court. I would like to have some idea of what the expense will be. I do not wish to take another leap in the dark. * * * I am willing to sustain my fair proportion," etc. July 21st, Seelye sent Sanders an appeal bond for his signature and stated in his letter: "The costs of an appeal will not exceed \$500, and may fall quite below that," etc. The appeal was taken to the Supreme Court. Sanders was informed of it and wrote several letters to Seelye inquiring about the decision of that court. Seelye and Quick & Miller had charge of the case in the Supreme Court, and Sanders was informed thereof. January 29, 1885, the Supreme Court reversed the order of the Appellate Court affirming the decree, and the result was largely favorable to Sanders. Before hearing of the decision of the Supreme Court, Sanders asked Seelye if he had his 195 bonds in a secure place, and learning that he had not received them, on February 5th, sent Seelye an order for the bonds, directing him to put them in a safe place and hold them subject to his order. Seelye took the bonds and put them in the vault of Quick & Miller, where they now remain. A dispute having arisen between Seelye, Quick & Miller and Sanders, about the amount of compensation the attorneys were entitled to, Sanders demanded his bonds, but the appellees insisted upon retaining them under

an attorney's lien until their fees in this litigation as well as their general balance of account against Sanders is paid. A rule to show cause why the bonds should not be surrendered to Sanders, was issued on his motion by the Circuit Court, but on the hearing of the matter, that court decreed that Sanders was indebted to Seelye in the sum of \$1,158.25, and to Quick & Miller in the sum of \$4,950, and that they respectively have retaining liens on the bonds for the payment of their claims. Sanders excepted to the decree and appealed.

Mr. D. T. CORBIN, for appellant.

Messrs. D. J. SCHUYLER and HENRY E. SEELYE, for appellees.

GARNETT, J. The chief point in dispute in this case is whether the letters referred to in the statement of the case, and the action of the parties, constitute a contract for all the services rendered by appellees for appellant until the decision of the Supreme Court, for the sum of \$500 if successful, and \$300 if not successful, or was for services in the Appellate Court only. The Circuit Court held the latter was the true interpretation. Sanders, in his letter of September 25, 1882, taken alone, seems to be emphatic in his determination not to pay more than \$500 for a reversal of the decree in the Supreme Court. It must be admitted, however, that he did not always mean the Supreme Court when he used those words. In his letter of September 16, 1882, he acknowledged receipt of Seelye's letter of the 14th, referring, as he (Sanders) says, to securing counsel to attend to his interests in the Supreme Court, although Seelye's letter of the 14th distinctly named the Appellate Court and made no reference to the Supreme Court. Thus there was a foundation laid for the supposition that when he said "Supreme Court" in his letter of September 25th he meant the Appellate Court. That Seelye acted on that supposition, in good faith, is shown by the fact that immediately after its receipt he called on Herbert, Quick & Miller, and proposed to have them represent Sanders in the Appellate

Sanders v. Seelye.

Court. On the same day (September 28th) they wrote Seelye that they had considered his proposal in behalf of Mr. Sanders that they should represent his interests in the *Appellate* Court, and declined the same. That letter was sent by Seelye to Sanders, and in his letter inclosed therewith, Seelye said: "I submitted *your proposition* to Messrs. Herbert, Quick & Miller, and have just received the inclosed." There was distinct and definite information given to Sanders that Seelye understood him to mean the *Appellate* Court, in his letter of September 25th. If Sanders did not mean that he should have so stated by correcting Seelye. When he afterward learned that Herbert was at work on his case in the Appellate Court, he must have known that he had reconsidered the matter and determined to accept the proposal which his letter showed he understood to have been made by Sanders. If Sanders did not wish his services as he was informed Herbert understood he was rendering them, he should have spoken. Having remained silent, it is now too late to speak. This view of the question is confirmed by the correspondence between Seelye and Sanders in June, 1883, after the decree was affirmed by this court. Up to that time Sanders, in his letters to Seelye, had insisted on the binding force of his letter of September 25th. When additional expense, not within the terms of that letter, was proposed to him, for the purpose of an appeal to the Supreme Court, he no longer refers to that letter as the measure of his undertaking, but inquires about the amount that will be required, and says he is willing to sustain his fair proportion. It may be fairly said that this was a tacit admission that the contract between the parties had reached its termination.

We are not satisfied from the record that anything was allowed to Seelye for his services in the Appellate Court. The decree allowed \$1,200 *on account* of items six and ten in the bill presented by him. Item six was a charge of \$1,750 for services in the matter of agreement with W. L. Peck et al., and item ten was a charge of \$1,000 for services and disbursements in Appellate, Supreme and Circuit Courts. The decree of the Circuit Court made a large reduction from the amounts allowed by the master on those two items; the evidence being

sufficient to sustain the amount allowed by the court, and there being nothing to show that any part of the amount was allowed for services in the Appellate Court, we can not say the decree is erroneous on account of this allowance. The bonds came into the hands of the attorneys in the course of their professional employment, and they are therefore entitled to a lien on them for the general balance of their accounts. Weeks on Attorneys at Law, Sec. 371; 1 Jones on Liens, Secs. 115, 119.

A number of other questions have been forcibly argued by counsel for appellant and by counsel for appellees on their cross-errors, but as a separate and formal presentation of them in this opinion would not be serviceable either to the parties or the profession, we must content ourselves by saying that they have all had careful consideration, and we find the decree of the court below is not unwarranted in any point. It is therefore affirmed.

Decree affirmed.

TOWNER K. WEBSTER, RECEIVER,

V.

NOBLE B. JUDAH, ASSIGNEE.

Insolvency—Jurisdiction—Rights of Resident Creditors of Foreign Insolvent—Order to Pay Dividends, not Final—Garnishment—Jurisdiction.

1. It is the policy of the law to secure to resident creditors of a foreign insolvent priority over foreign creditors as to assets here situated.

2. An order of the County Court directing the assignee of an insolvent's estate to pay to the receiver of a foreign insolvent's estate all dividends thereafter declared on a claim held by the latter, is not a final order. It may be set aside on good cause shown at any time before the payment of the final dividend.

3. In the case presented the County Court should have granted the petition of the appellant for leave to garnishee the assignee of a resident insolvent, on a claim against the estate of the foreign insolvent.

4. The County Court is not a court of equity for the disposition of all incidental disputes between creditors of insolvents and third parties growing out of antagonistic claims to dividends payable from the insolvent estate.

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[Opinion filed September 19, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

The appellant, a citizen of Illinois, was appointed receiver of the partnership estate of Mershon & Bancroft, also citizens of Illinois, by the Superior Court of Cook County, December 17, 1887. Among the assets coming into the hands of the receiver was a valid claim for about \$2,500 against the New Haven Wire Company, a corporation organized under the laws of Connecticut. That company became insolvent, and S. A. Galpin was appointed receiver thereof by the Probate Court of New Haven County, in the State of Connecticut, on the 6th day of September, 1887. Among the assets of the company was a claim for a large amount against the firm of Sherman & Marsh. The latter firm became insolvent prior to September 6, 1887, and appellee was appointed its voluntary assignee for the benefit of creditors, and the estate of the firm being in process of settlement in the County Court of Cook County, said company duly proved therein its claim against the estate of said Sherman & Marsh. September 24, 1887, the receiver of said company presented to the County Court a certified copy of the order of court appointing him, and an order was then entered by the County Court substituting Galpin, receiver, as claimant in place of said company, and directing said assignee to pay to said Galpin, as receiver, any and all dividends that might be declared on said claim. Two dividends were ordered by the County Court, and paid by appellee to Galpin. Thereupon appellant filed his petition in the County Court, praying for an order directing appellee to pay appellant to the extent of his claim, out of any dividends which might thereafter become due and payable on said company's claim. On February 10, 1888, a third dividend was declared, but was not paid to Galpin on account of an order of the County Court, entered on the said petition of appellant, directing appellee to hold the same until the further order of the court. Appellant then commenced suit against said company

on said claim, with attachment in aid, in the Superior Court of Cook County, and thereafter filed this supplemental petition in the County Court, praying for leave of that court to garnishee appellee in the attachment. The New Haven Wire Company has no other assets than its said claim against the estate of Sherman & Marsh.

The facts herein stated are admitted by both parties. The County Court denied the prayers of the petitions and dismissed the same expressly and solely because of its order of September 24, 1887, and the payment of the first two dividends to Galpin, receiver, and that by reason thereof, said Galpin would be able to successfully maintain his title to the third dividend in case he was garnished as proposed by appellant.

Messrs. MOSES & NEWMAN and MILLARD R. POWERS, for appellant.

Appellant is a resident creditor and the Illinois courts protect resident creditors. This is the theory of our attachment laws. *Hyer v. Alexander*, 108 Ill. 395, cited in *Lipman v. Link*, 20 Ill. App. 364.

The doctrine is well settled that "the powers of a receiver are co-extensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against him have been satisfied." *C., M. & St. P. Ry. Co. v. Packet Co.*, 108 Ill. 322; *High on Receivers*, Sec. 47.

We contend that if the dividend has actually been paid over to the Connecticut receiver, he being in this State with the fund, would, as against a domestic creditor, be subject to our garnishment laws. But the case at bar is much stronger, and we pray for the reversal of the order of the County Court and for an order that said court proceed to grant petitioner leave to implead the appellee.

Mr. JOSEPH WRIGHT, for appellee.

No case has been cited by appellant which holds that a foreign receiver, taking title not only by his appointment, but also by absolute deed of conveyance, can be forced to hand over property to a resident attaching creditor, after he has once taken possession of it for the benefit of all the creditors. In the very case cited by appellant, the C., M. & St. P. Rd. Co. v. Packet Co., 108 Ill. 325, the Supreme Court recognize the right of the foreign receiver, who has once taken possession of property, to hold it as against resident creditors.

Nearly all the cases found on this point are cases where resident creditors have attached property before the assignee or receiver had taken, or in any way attempted to take possession of the property, and where the assignee or receiver came into the proceeding by way of interpleader and claimed the property. In the case before this court the position of appellant is different from that of the attaching creditors. Here Mershon & Bancroft and the appellant had obtained no fixed legal rights to the fund or claim prior to the possession thereof taken by Galpin.

Upon this point the attention of the court is called to the case, Patterson v. Lynde, 112 Ill. p. 207, at the end of which the court used the following language: "The doctrine is recognized by this court that a receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, but, where resident creditors have no fixed legal claim to the property, he may be allowed, as a matter of comity, to remove the same."

GARNETT, J. This record shows conclusively, as between appellant and appellee, that appellant's claim against the New Haven Wire Company is just and lawful, and the only hope of collecting it is by garnisheeing the appellee. Unless there is some inexorable rule of law or practice to the contrary, the County Court should have granted the prayer of the amended petition. That court could not entertain the controversy and mete out justice to the rival claimants. It is not a court of equity for the disposition of all incidental disputes between creditors of insolvents and third parties, growing out of antagonistic claims to dividends payable out of the insolvent estate. The amount involved exceeds the jurisdictional limit of the

County Court. Either party was entitled to a jury trial, and that court had no jurisdiction at law of the case. Appellant is remediless, unless he is permitted to proceed with his suit at law and garnishee appellee. Appellant is a resident creditor of the New Haven Wire Company, representing the estate of resident creditors of that company, and the policy of our law secures to creditors resident in this State, if they avail themselves of it by proper legal steps, a priority as against foreign creditors on the assets here situated and belonging, or debts here owing to the estate of a foreign insolvent. *Heyer et al. v. Alexander et al.*, 108 Ill. 385.

Domestic creditors may, by suitable proceedings, prevent the removal from this State of assets of that character until their own claims are satisfied. Galpin, the receiver appointed by the Connecticut court, now proposes to collect the money due the foreign insolvent and administer it under the laws of that State, thus compelling the domestic creditor to seek relief in a foreign jurisdiction, where, for aught we know, the entire fund may be absorbed by creditors on whose motion Galpin was appointed, to the exclusion of appellant.

The ground upon which the court based its denial of appellant's prayer, is not sound. The order of September 24, 1887, was not a final order, but might have been set aside, on good cause shown, at any time before the payment of the final dividend. Moreover, appellant was not a party to the proceeding at that time, and he can not be prejudiced thereby. Galpin is not a *bona fide* purchaser, whose claim must be respected in an attachment suit. One having a prior equity, as we have seen is the case with appellant, has a superior right, of which he can not be deprived by a transfer to one paying no consideration. *Born v. Staaden*, 24 Ill. 320.

The County Court should have granted appellant leave to proceed against the appellee by way of garnishment, otherwise there is a manifest failure of justice.

We express no opinion as to whether appellant shall sue in his own name or in that of *Mershon & Bancroft*. He should be permitted to proceed in that respect as he may be advised.

The order of the County Court is reversed and remanded.

Reversed and remanded.

JACOB SANKEY ET AL.
V.
WILLIAM C. SEIPP ET AL.

Tax Sales—Precept—Sec. 194, Chap. 120, R. S.—Equity—Jurisdiction—Practice.

1. A sale of lands for taxes is invalid unless the county clerk has made the certificate to be entered of record as required by Sec. 194, Chap. 120, R. S. To make the sale valid there must be a valid precept.

2. Where a tax certificate has been issued on an illegal sale of land for taxes, a court of equity has jurisdiction of a bill to remove the cloud on the title.

3. An offer in the bill to pay whatever moneys, taxes and interest equity may require, is a sufficient offer to do equity.

4. Upon the remanding of the cause the court below may deal with deeds issued on the certificates in question pending this proceeding. Such deeds are of no higher validity than the certificates.

[Opinion filed September 19, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MR. F. W. S. BRAWLEY, for plaintiffs in error.

MESSRS. H. S. MECARTNEY and AUGUSTUS N. GAGE, for defendants in error.

MORAN, P. J. Plaintiffs in error filed their bill in the Superior Court against the defendant in error, seeking to have certain certificates of sale for taxes held by some of the defendants canceled as clouds on complainant's title, and the said sale for taxes, in pursuance of which said certificates were issued, annulled. A large number of lots are described in the bill, and the persons to whom sold, named, and the amounts for which said lots sold respectively stated.

It is alleged that at the time of filing the bill and for several years prior thereto complainants were the owners in fee simple

of said lots, and that all of them were unimproved and unoccupied except two, which were in the possession of complainants by tenant; that the county collector, attended by the county clerk, sold said lots in October, 1884, for some pretended tax or assessment, and the county clerk issued to the said purchasers the usual certificates of purchase. As ground for canceling said certificates the bill alleges that the county clerk of Cook County did not, at any time before said pretended sales, make any certificates to be entered on the record as required by the statute in such case made and provided, which should be the process on which all real property or any interest therein, should be sold for taxes, special assessments, interests and costs due thereon; therefore, said sales were illegal and the certificates issued thereon clouds on complainant's title, and should be canceled. The prayer is that said several sales may be annulled and the said certificates set aside and declared void as against complainant as a cloud upon his title to said lots, and that the county clerk of Cook County may be enjoined from issuing any deed or deeds upon said sales or either of them, complainant to pay whatever moneys, taxes and interest equity and the court might require of him in that regard. A general demurrer was filed to the bill and on argument the demurrer was sustained and the bill dismissed for want of equity. This was error.

The statute relating to the sale of lands for taxes, provides as follows: Sec. 194, Chap. 120 R. S. "On the day advertised for sale, the county clerk, assisted by the collector, shall carefully examine said list upon which judgment has been rendered, and see that all payments have been properly noted thereon, and said clerk shall make a certificate to be entered on said record, following the order of court, that such record is correct, and that judgment was rendered on the property therein mentioned for the taxes, interest and costs due thereon, which certificate shall be attested by the clerk under seal of the court, and shall be the process on which all real property, or any interest therein, shall be sold for taxes, special assessments, interest and costs due thereon," and the form of such certificate is specified.

It is sufficiently alleged in the bill that the clerk did not, at any time before the sale, make any certificate to be entered of record as required by the terms of the foregoing section of the statute and such allegation in the bill is admitted by the demurrer to be true. The failure of the clerk to make such certificate, rendered the sale invalid; for, while the tax judgment may have been valid, there was no valid precept to the officer assigned by law to make the sale. To make a valid sale, a valid precept is as essential as a valid judgment; either lacking, the sale is void. *Eagan v. Connelly*, 107 Ill. 458.

The certificates of sale issued to defendants in error in pursuance of such sale, were therefore invalid and a cloud upon complainant's title, and it has been repeatedly decided by the Supreme Court of this State that where a tax certificate has been issued upon an illegal sale of land for taxes, a court of equity will take jurisdiction to annul the sale and cancel the tax certificate and thus remove the cloud upon the title to the land. *Gage v. Rohrback*, 56 Ill. 262; *Gage v. Chapman*, 56 Ill. 311; *Phelps v. Harding*, 87 Ill. 442.

Complainants, in their bill, offer to pay whatever moneys, taxes and interest equity may require. This was a sufficient offer to do equity, and under such offer the proper course was for the court to require complainants to refund to the defendants in error the amount paid by them, with interest on the sum or sums paid at the rate of six per cent. from the date of judgment, and on that being done to cancel the certificates. *Gage v. Pistle*, 20 Legal News 298; *Gage v. Nichols*, 112 Ill. 269.

It will be noted that the demurrer filed to the bill in this case was not a demurrer for multifariousness, but a general demurrer to the bill for want of equity.

There can be no doubt of the equity of the bill. The defendants in error have filed a plea in this court in bar of the writ, in which they aver that since the dismissal of the bill in the court below, and before the suing out of this writ of error, deeds have been issued to them on said certificates by the county clerk.

To this plea, plaintiffs in error have demurred. There is

nothing alleged in the plea to bar the writ. The deeds are of no more validity than the certificates, and they can be dealt with upon proper suggestions on the return of the case to the Superior Court. The decree dismissing the bill will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

27 302
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WORLD'S SOAP MANUFACTURING COMPANY

v.

JASPER R. WOLTZ.

Practice—Appeal from Justice—Affidavit of Merits—When to be Filed.

Where an action, commenced before a justice with an affidavit of claim, is appealed to the Circuit Court, the defendant is not required to file an affidavit of merits until the cause is reached for trial.

[Opinion filed September 19, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. WALKER, FURTHMAN & JUDD, for plaintiff in error.

MESSRS. TOLMAN & DAVIES, for defendant in error.

MORAN, P. J. This action was commenced before a justice of the peace, and from the judgment rendered by the justice against plaintiff in error an appeal was taken to the Circuit Court. An affidavit of claim was filed by defendant in error in the justice court, in accordance with the provisions of Sec. 34, Chap. 79. R. S., and said affidavit of claim was sent up to the Circuit Court, with the transcript and other papers in the case.

At a term of the Circuit Court, after the court had obtained

Siemens-Lungren Gas Illuminating Co. v. Francis.

jurisdiction of the parties by appearance and of the subject-matter, but before the case was reached for trial, a judgment was taken against plaintiff in error by default, for want of an affidavit of merits, on the theory that the affidavit of claim filed before the justice authorized such judgment. The practice adopted is claimed to be warranted by the last clause of the section of the statute above cited, which provides, "that in case of an appeal from the judgment of the justice of the peace, as aforesaid, such affidavit shall have the same force and effect in the appellate court as if such suit had been commenced in such appellate court."

We considered and construed such provision of the statute in the case of *Martin v. Hochstadter*, decided at the present term of this court [*ante*, p. 166], and there held the practice here complained of was not warranted by law.

The views of this court are fully set forth in the opinion of Mr. Justice Garnett, and need not be here repeated. The entry of the judgment as by default was erroneous, and the judgment will be reversed, and the case remanded to the Circuit Court.

Reversed and remanded.

SIEMENS-LUNGREN GAS ILLUMINATING COMPANY

v.

LOUIS G. FRANCIS.

Sales—Order for Goods to be Manufactured—Rescission—Action to Recover Price—Trial by Court—Practice.

In an action to recover the price of certain regulators for gas lamps, manufactured and delivered after the order for them was countermanded, the trial below having been by the court, it is *held*: That, if the contention of the defendant that a continuation of the test upon which the order and warrant were based resulted in failure, is well founded, the defendant was justified in rescinding the order; and that, in the absence of a finding of facts contrary to such contention and in favor of plaintiff, the court erred in refusing to hold a proposition of law based upon the hypothesis of the defendant.

VOL. 27.] Siemens-Lungren Gas Illuminating Co. v. Francis.

[Opinion filed September 19, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

This is an appeal from a judgment rendered against appellant and in favor of appellee, for certain regulators alleged to have been manufactured by appellee for appellant. The evidence shows that appellee brought to appellant's place of business a regulator, and that a test was made of such regulator upon a gas lamp by appellee and one Wolf who was president of the appellant company.

The test lasted till about eleven o'clock at night, and the regulator appeared to work satisfactorily. Before leaving his office on the evening of the test the president of the company gave the following order to appellee:

FEBRUARY 29, 1886.

L. G. FRANCIS, Esq.

Dear Sir: "Please make me one hundred of your improved pipe regulators for our gas lamps, and deliver to us as soon as possible. If you find you can afford them at \$3.56 each after making this one hundred, well and good. If not, I will pay you \$3.75 each for the first one hundred cash, as soon as done and ready to deliver.

"THE SIEMENS-LUNGREN GAS ILLUMINATING CO.

"JOSEPH WOLF, Pres't."

Concurrently with the delivery of the foregoing order, and as a part of the transaction, appellee executed and delivered the following:

CHICAGO, February 26, 1886.

"This is to certify that in selling Messrs. Siemens-Lungren Gas Illuminating Company my pipe gas regulators I warrant them all well made in every particular, and to work in every way as perfect as the one the trial test was made with when the order for one hundred machines was given. It will hold a uniform pressure to the burner at all times. In all the regulators sold by the hundreds, I have never had one fail to work in satisfactory manner, and I warrant these to work the same.

"L. G. FRANCIS."

Appellant introduced evidence tending to show that after the order was given the test of the regulator was continued all night, by an employe of appellant, and by appellee, and when Wolf came down in the morning he found that the regulator had failed, and would not do the work, and he thereupon sent for appellee and told him, in substance, that the regulator would not work, and that they would not bother with it, and that he wanted the order back, as they would have nothing more to do with the governor. Appellee introduced evidence tending to show that the order was not given on the occasion when the regulator failed, but was given on the occasion of a subsequent test, after he had improved the regulator, and when it worked perfectly.

Appellee made a hundred regulators and delivered them at appellant's place of business and brought this suit to recover the price thereof. The case was submitted to the court and the finding was in favor of appellee. On the trial the appellant submitted to the judge to be held, among others, the two following propositions of law, which the court refused :

" Proposition No. 3. That if it appears from the evidence that the trial test mentioned in the contract of warranty was made on the evening of February 26, 1886, at eleven o'clock P. M. of said day, the test made was satisfactory, and upon such satisfactory test the order for one hundred governors was given, and it shall further appear that the lamp with governor continued burning all night and in the morning it was found that the lamp and room were filled with smoke because of the defective action of the governor, that then, if the defendant had reason to believe and did believe the said governors would not do satisfactory work, it had the right to rescind the contract and to notify the plaintiff of such rescission.

" Proposition No. 4. That, if it shall appear that the state of facts as contemplated in instruction No. 3 existed and that on the morning of the 27th of February, 1886, the defendant did notify the plaintiff that the governors in question were valueless, or would not do satisfactory work, and the plaintiff in spite of such notification persisted in manufacturing said

VOL. 27.] Siemens-Lungren Gas Illuminating Co. v. Francis.

governors and tendering the same to the defendant, that then the defendant had the right to reject the same."

Messrs. PAYNE & PORTER, for appellant.

The order was rescinded by appellant the day after it was given, and before anything had been done by appellee toward manufacturing the goods.

We contend that the rights of the parties were fixed and determined at the time of that rescission, and that nothing done subsequently by either party could affect those rights. In other words, Francis has the right to hold appellant liable for damages sustained up to the time of the rescission, in an action for breach of the contract, but he had not the right to go ahead and manufacture the regulators, and then recover the price fixed by the rescinded contract, as was done in this case. *Hosmer v. Wilson*, 7 Mich. 294; *Collins v. Delaport*, 115 Mass. 159.

It was the duty of the appellee, after the rescission of the contract by appellant, to save the latter from all further damages, so far as it was in his power. *Dillon v. Anderson*, 43 N. Y. 231; *Danforth v. Walker*, 40 Vt. 237.

Messrs. WILBER, ELDRIDGE & CLARK, and JOHN W. SMITH, for appellee.

MORAN, P. J. Upon the hypothesis contained in the two propositions set out in the statement of facts, it is very clear that appellant would have the right to reject the regulators. *Hosmer v. Wilson*, 7 Mich. 294; *Danforth v. Walker*, 37 Vt. 239.

There was a conflict of evidence as to the facts on which the hypothesis contained in the propositions was based, and if the judge was convinced that the appellee was right on this issue of facts, he could have so found and modified the propositions, or have held the law of the propositions and denied the assumed facts. The effect of refusing the propositions is to find the facts as stated in them, but to deny the conclusion of law announced.

The court erred in refusing the 4th proposition, as con-

Payette v. Free Home Association.

nected by reference to the 3d, and while, if the judgment rested on a finding of facts in favor of appellee, we might not be disposed to interfere, for the error in law in refusing to hold said proposition, we must reverse the judgment and remand the case.

Reversed and remanded.

EDWARD PAYETTE ET AL.

v.

FREE HOME BUILDING, LOAN AND HOMESTEAD ASSOCIATION.

Trust Deed—Foreclosure—Building Association—Defective Organization—Estoppel—Attorney's Fees.

1. Where there has been an attempt made in good faith to organize a loan and building association under the laws of this State, and the association has done business as a corporation, one who has borrowed money from it as a corporation *de facto*, can not set up its defective organization by way of defense to a bill for the foreclosure of a trust deed given to secure the payment of the money borrowed.

2. A provision in a trust deed authorizing the payment of attorney's fees in case of a foreclosure by the trustee, does not sustain a decree including attorney's fees upon a bill filed by the *cestui que trust*.

[Opinion filed September 19, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. HENRY HUDSON and YOUNG & MAKEEL, for plaintiffs in error.

Mr. OLIVER N. GOLDSMITH, for defendants in error.

MORAN, P. J. The decree appealed from in this case was entered on a bill filed by defendant in error against plaintiff in

error to foreclose a certain trust deed which was executed by Edward Payette and wife to Patrick W. Holway as trustee, to secure the payment of an indebtedness of \$1,300 from said Payette to the said defendant in error.

The loan was made under the terms usual with said Loan and Building Association, and was payable in monthly installments, and the borrower became, under the rules of the association, a stockholder therein. It is sought to defend against the right of defendant in error to a decree of foreclosure, on the ground that the association did not comply with the provision of the law regarding the organization of such associations, and that therefore it never became a corporation under the law, and can not transact business or have a standing in court as such.

It appears that there was an attempt to organize the association made in good faith under a law of this State authorizing the organization of such associations, and that the association has done business as a corporation, and that plaintiff in error contracted with the association as a corporation *de facto*, and received the money which, by his contract with the association, he agreed to repay, from the said association. Under such circumstances he will not be allowed to suggest a defect in the organization in order to prevent the recovery of the money loaned to him. While under the rules of the association he became a stockholder, yet the suit is not brought to recover for his shares of stock, but to recover for money advanced to him. Hence he does not come under the exception to the general rule which allows a stockholder, when sued for his stock subscription, to question the legal existence of a corporation. *Hudson v. Green Hill Seminary*, 113 Ill. 618.

The association was entitled to a decree of foreclosure for the money loaned and the interest thereon according to the terms of the agreement executed by Payette, but not to a decree including attorney's fees; and the decree having allowed attorney's fees against plaintiffs in error, must therefore be reversed.

The trust deed which is being foreclosed authorized the payment of attorney's fees in case a bill was filed by the trustee, in his own name or otherwise, to obtain a decree for the

Campbell v. Campbell.

sale of the premises conveyed in the trust deed. This bill is not filed by the trustee, but by the *cestui que trust*; hence the agreement to pay attorney's fees does not apply in favor of the complainant. Stipulations in trust deeds or mortgages to pay attorney's fees are always strictly construed, and are never enforced except under the terms of the agreement they are clearly provided for.

See the opinion of this court by Mr. Justice Bailey, Cheltenham Beach Improvement Company v. Whitehead, 26 Ill. App. 609, where this question is fully considered, on a stipulation similar to the one contained in this trust deed.

For the allowance of the \$130 attorney's fee the decree will be reversed and the cause remanded, with directions to the Circuit Court to enter a decree conforming to this opinion.

Reversed and remanded.

MARY E. CAMPBELL

V.

ANDREW CAMPBELL.

Divorce—Cruelty—Bill—Allegations—Sufficiency of.

It is sufficient in a bill for divorce for extreme and repeated cruelty, to make such allegations as will admit the proof of cruelty and of at least two distinct acts of personal violence. Such distinct acts may be alleged as occurring on the same day.

[Opinion filed September 19, 1888.]

IN ERROR to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. LEVI SPREAGUE, for plaintiff in error.

Mr. E. W. ADKINSON, for defendant in error.

MORAN, P. J. Plaintiff filed her bill for divorce and after

allegations sufficiently stating her marriage with defendant and her residence in the State alleged her cause for divorce as follows:

"And your oratrix charges that very soon after their said marriage as aforesaid, the said defendant commenced a course of extreme and repeated cruelty toward your oratrix; that he has often threatened and abused your oratrix in a most cruel and shameful manner. That on, to wit, the 9th day of May A. D. 1886, at the city of Chicago aforesaid, the said defendant caught hold of your oratrix by her throat and threw her down upon the floor, and choked, beat, bruised and otherwise maltreated your oratrix in a most cruel, angry, rude and revengeful manner. And again, on the same day last aforesaid, at the place aforesaid, the said defendant again choked, beat, bruised and otherwise maltreated your oratrix, and threatened to take the life of your oratrix, and by means of force took from your oratrix a certain gold watch, of the personal goods and chattels of your oratrix.

"So your oratrix charges that the said defendant, Andrew Campbell, has been and is guilty of extreme and repeated cruelty toward your oratrix."

Defendant demurred to the bill on the ground that no case was made in the bill which entitled complainant to the relief sought, and the Circuit Court sustained the demurrer and dismissed the bill, and complainant brings the case to this court by appeal, and the question presented is whether the portion of the bill above set out sufficiently states a case of extreme and repeated cruelty entitling complainant to a divorce under the statute of this State.

It is sufficient in stating the cause for divorce for extreme and repeated cruelty, to make such allegations as will admit the proof of cruelty, and of at least two distinct acts of personal violence.

The bill alleges that soon after the marriage he commenced a course of extreme cruelty toward her, and that he has often threatened and abused her in a most cruel and shameful manner. That allegation would certainly admit the proof of various and different facts by which general and repeated cruelty

Curtis v. Williams.

would be established. Then as to the acts of physical violence the time and place is given, and the act so described as to clearly make it an act of extremely cruel violence to the person of complainant, and then it is alleged that on the same day, and at the same place the defendant again choked, beat, and bruised her, and threatened to take her life, and by force took from her a certain gold watch, her personal property.

There are sufficiently alleged, two distinct acts of physical violence. That they are both alleged on the same day, and at the same place, does not weaken the allegation. Two distinct acts of violence to the person of the wife by the husband, occurring on the same day, furnish as strong technical cause for divorce, as two such acts occurring in the same week or month, and may in fact constitute a more meritorious cause. The effect of the demurrer is to admit that plaintiff in error was beaten, choked and bruised twice on the same day by her husband, and that she was often threatened and abused by him prior thereto in a most cruel and shameful manner.

We are of opinion that such allegations are sufficient to enable plaintiff in error to introduce her proof, and that it was error to sustain the demurrer to the bill.

The decree dismissing the bill will be reversed, and the case remanded to the Circuit Court.

Reversed and remanded.

SARAH A. CURTIS

v.

IDA G. WILLIAMS.

27	311
68	543

Jurisdiction—Appeal from Interlocutory Order—Stay of Proceedings—Act of June 14, 1887.

1. This court has no jurisdiction of an appeal from an order staying proceedings on an original bill, until the issues should be made upon a cross-bill, and until the further order of the court.

2. Such an order is not an injunction within the meaning of the Act of June 14, 1887.

[Opinion filed September 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. KRAUS, MAYER & STEIN, for appellant.

MESSRS. CASE, JUDSON, HOGAN & BRADLEY and ELA & GROVER, for appellee.

GARNETT, J. An original bill to foreclose a trust deed was filed by appellant against appellees January 20, 1886, in the Superior Court of Cook County, and the issues being made up, was referred to the master, who, having taken proofs, was about ready to make his report, when the stay order herein after referred to was entered. On April 5, 1888, Ida G. Williams filed her cross-bill in the cause, and on May 16th, her amended cross-bill, against Sarah A. Curtis and the other defendants, making also a new party defendant, Margaret A. Humble, and praying therein, among other things, that said Curtis and Humble might interplead, and that their several claims to the notes secured by the trust deed might be adjusted and settled. On application of complainant in the cross-bill, the court, by its order entered June 6, 1888, stayed all proceedings on the original bill until all the issues should be made up on the cross-bill, and until the further order of the court. The reversal of that order is the object of the appeal. We are clearly of the opinion there is no statute in force which sanctions an appeal from such an order. It is not an injunction within the meaning of the act entitled "An act to provide for appeals from interlocutory orders granting injunctions or appointing receivers," approved June 14, 1887, in force July 1, 1887. We have no disposition to enlarge the extraordinary privileges granted by that act. By no fair construction can it be held to extend to those customary orders resting in the discretion of the court, by which the successive steps in a cause are timed, and its progress is shaped, until the final decree. The effect of the order in question might have been secured with-

Adams v. Cross Wood Printing Co.

out any entry on the record. The court may, in its discretion, refuse to hear the issues on the original bill until the cross-bill is ready for hearing. The act vests this court with no such supervisory jurisdiction as this appeal imputes to it.

The appeal is dismissed for want of jurisdiction.

Appeal dismissed.

ABBOTT L. ADAMS ET AL.

V.

THE CROSS WOOD PRINTING COMPANY ET AL.

27	313
49	186
27	313
61	425
27	313
80	257

Creditor's Bill—Corporations—Insolvency—Claims of Directors—Application of Assets—Power to Confess Judgment—Authority of Officers to Execute—Parties.

1. Upon a creditor's bill a court of equity has ample power to reach assets in the hands of any person who is holding them without legal right, and to apply them in satisfaction of the claims of judgment creditors.

2. A director of an insolvent corporation can not apply its assets to the payment of a claim due himself to the exclusion of other creditors.

3. The president and treasurer of a corporation have no implied power to execute a power of attorney to confess a judgment against such corporation. They can only exercise such power when it has been given to them in express terms by the board of directors.

4. In the case presented, in the absence of the corporate seal, there was not even *prima facie* authority to enter the judgments in question, and such judgments and the executions issued thereon are void and may be assailed by any person interested.

[Opinion filed September 19, 1888.]

IN ERROR to the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. FRANK J. SMITH & HELMER, for plaintiffs in error.

The officers of a corporation have no authority to confess a judgment for the corporation without the express authority of

the board of directors. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Thew v. Porcelain Mfg. Co.*, 5 S. C. N. S. 415.

The directors of a corporation have no implied authority to act singly; they can act only as a board. *Mor. Priv. Corp.* (2d Ed.) 531-2; *Koehler v. Hubby*, 67 U. S. 715; *Angell & Ames on Corp.* 232.

A judgment void for collusion or fraud may be abated by any creditor who is injuriously affected thereby, collaterally or otherwise. *Martin v. Judd*, 60 Ill. 78; *Re Dougherty's Estate*, 9 W. & S. 196; *Van Winkle v. Smith*, 26 Miss. 491; *Thompson's Appeal*, 57 Pa. St. 178.

The directors of an insolvent corporation can not pay themselves out of the assets of the company to the exclusion of other creditors. *Mor. Priv. Corp.* (2d Ed.) 787; *Richards v. Ins. Co.*, 43 N. H. 263; *San Francisco R. R. Co. v. Bee*, 48 Cal. 398; *Hopkins' Appeal*, 90 Pa. St. 69; *Stout v. Milling Co.*, 13 Fed. Rep. 802; *Koehler v. Hubby*, 67 U. S. 715; *Bradley v. Farwell*, 1 Holmes, 433; *Drury v. M. & S. R. R. Co.*, 7 Wall. 299; *Jackson v. Ludeling*, 21 Wall. 616; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 590; *Corpet v. Woodward*, 5 Sawyer, 416; *Coons v. Tome*, 90 Fed. Rep. 533; *Beach v. Miller* — Ill. —.

IRA W. BUELL, for Alfred J. Cross and Edward Richards, defendants in error.

MORAN, P. J. Plaintiffs in error, who constituted three separate firms, filed their bill setting up the recovery by each firm of a judgment against the Cross Wood Printing Company, the issue of executions on said judgment and the return of executions on each judgment, no part satisfied. The bill contains all the usual allegations of a creditor's bill and avers that said Cross Wood Printing Company was, about December 17, 1883, engaged in business in the city of Chicago; that it held and owned divers securities and also goods, wares and merchandise and equitable interests which ought to be applied to the payment of complainant's judgments; that it has dis-

Adams v. Cross Wood Printing Co.

posed of its property with intent to hinder and delay complainants; that the debts on which complainants' judgments are founded were created prior to the 10th day of December, 1883; that on said 10th day of December the Cross Wood Printing Company was, to the knowledge of all its officers and directors, insolvent. That the board of directors of said Cross Wood Printing Company never at any time prior to December 17, 1883, authorized the president and treasurer or any other officer of said company to make or execute any power of attorney to confess any judgment or judgments against said company. That, nevertheless, John R. Cross, pretending to be president of said company, and A. J. Pratt, as treasurer of said company, on or about the 15th day of December 1883, executed and delivered to said A. J. Cross a so-called judgment note in form as follows:

\$1,350.20.

CHICAGO, Dec. 15th, 1883.

"On-demand after date for value received, we promise to pay to the order of Alfred J. Cross, thirteen hundred and fifty 20-100 dollars, at our office, Chicago, Ill., with interest at 7 per cent. per annum after date until paid.

And to secure the payment of said amount, we hereby authorize irrevocably any attorney, at any court of record, to appear for us in such court in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

CROSS WOOD PTG. Co.

by JOHN R. CROSS, *Pres.*

A. J. PRATT, *Treas.*

That on the same day a similar note payable to the order of Edward Richards with like power of attorney and signed in the same manner, for the sum of \$1,653, was delivered to Richards, and that on December 17, 1883, said A. J. Cross and said Richards caused judgments to be entered upon their said

respective notes against the said Cross Wood Printing Company and executions to be issued thereon and levied upon the property of said company of the value of more than \$4,000, and caused the same to be afterward sold by the sheriff, and had the proceeds applied on the said executions; that both said A. J. Cross and said Richards were at the time of the entry of said judgments directors of said company, and knew that said company was at said time insolvent and unable to pay its just debts. Charges that said A. J. Cross and said Richards were and are liable to said Cross Wood Printing Company and to complainants as creditors thereof to account for the fair value of the said property so levied upon under said executions and converted by said parties to their use.

The separate answers of A. J. Cross and Richards to said bill deny that they knew of the insolvency of the corporation, admit the execution of the judgment notes, but deny that they were executed or the said judgment thereon entered without authority, but state no authority for entering the same; say the notes were given for a valuable consideration, to wit, for an actual indebtedness from said company to said Cross and Richards respectively; admit the sale under the executions, that property levied on only sold for \$1,400, which sum was applied on said executions; deny all fraud and say that they were actual *bona fide* creditors of the company, and say that the said judgments were just and are not void. Cross denies that he ever was a director of the company, and Richards admits that he was such director at the time the judgments were entered.

The bill was taken *pro confesso* against the corporation, and the case was tried as to the other defendants, and upon the hearing it was clearly shown that the corporation was insolvent at the time the judgment notes were given and the judgment entered, to the knowledge of Cross and Richards, and Pratt, who was the treasurer of the company, and that all the property of the corporation was taken under the execution; but in our opinion the evidence failed to establish that A. J. Cross was a director or officer of the corporation.

Complainants offered to prove that there was no resolution

of the directors of the company, or any other action ever had with reference to the execution of said judgment notes of Richards and Cross, but the court excluded the evidence, and there was no evidence whatever in the case tending to show that the officers of the corporation were ever authorized by the board of directors to execute a power of attorney to confess a judgment against the said corporation.

The court, after hearing all the evidence, dismissed the bill for want of equity, and appellants have appealed and assigned the entering of such decree for error.

The decree could not stand so far as the appellee Richards is concerned if there were no other ground of error than that he, while a director of the corporation which was insolvent, undertook to apply the property of the company to the payment of a debt due from the said company to himself, to the exclusion of other creditors of the corporation. That this will not be permitted has been well settled by numerous authorities. The Supreme Court of this State in the recent case of *Beach v. Miller*, 20 Legal News, 239, said: "When the corporation is insolvent, that is, when its assets are not sufficient, or not more than sufficient, to pay its debts, the shareholders have no claim upon its property, but all its property belongs to the creditors; in such case the directors having control of the assets hold them in trust for all the creditors and can not use them up in the payment of their own claim. *Morawetz on Priv. Cor.*, Sec. 787, and cases cited.

There is another ground of error, which, in our opinion, requires the reversal of the decree as to both Cross and Richards. The president and treasurer of a corporation have no implied power to execute a power of attorney to confess a judgment against the corporation. They can not lawfully exercise such a power unless it has been given to them in express terms by the board of directors. If the seal of the corporation is attached to the power of attorney it is perhaps *prima facie* sufficient to authorize the entry of the judgment, as it is evidence of the assent of the corporation when taken in connection with the signature of the proper officer or officers. In this case no seal of the corporation is attached to the power of

attorney, nor is there any seal at all upon it; and taking the note and the so-called power together, we are inclined to the opinion that there is not even *prima facie* authority for entering a judgment against the corporation upon it. However that may be, we need not finally determine; for the bill clearly alleges that no authority was ever conferred on the president and treasurer to execute the powers of attorney or to confess the judgments attacked, and this allegation of the bill is not denied by the answer; and the evidence offered by appellants to sustain this allegation should have been admitted by the court, and must, for the purposes of this review, be treated as in the case and as proving the allegations. The only authority, then, which the president and treasurer had to execute the power of attorney in question, was that which inhered in them as officers by virtue of their official position. The question here presented was decided in *The Joliet Electric Light & Power Company v. Ingalls*, in the Appellate Court of the Second District, in an opinion by Mr. Justice Baker. It was then said: "We think it plain, both on principle and from the authorities, that the president of a corporation has not, as a matter of law and simply by virtue of his office as president, authority to either confess a judgment against such corporation or execute a warrant of attorney empowering another so to do. Such matters form no part of the ordinary business of the company which the president, as its executive officer, is authorized to transact *virtute officii*. The power in question is not inherent in or incident to the office from either usage or necessity." The cases cited by the learned judge fully support the doctrine stated.

The judgments, then, were entered without authority of law, and were not binding on the corporation or its property. They were void and the executions issued upon them were also void, and being so void, not merely irregular or voidable, they may be assailed by any person and treated as of no force so far as they affect such person's interest.

In *Hoyt v. Thompson*, 5 N. Y. 321, where the president and cashier of a bank, without authority from the board of directors, undertook, by an instrument under seal, to assign the

property of the bank to the State of Michigan for a valuable consideration, and the bank being insolvent the transaction was attacked in the interest of creditors, the court said: "A deed formally executed under the corporate seal bears upon its face the presumption that it was executed by competent authority from the corporation; but this presumption may be repelled and the deed avoided by showing that the seal was affixed without authority. The assignments in question to the State of Michigan upon the facts shown are not voidable merely, but absolutely void. They appear on the face to convey a title, but on the facts stated and admitted they convey nothing; and, without reference to the insolvency of the corporation, their validity may be impeached by the corporation itself, or in connection with such insolvency by its creditors, directly or collaterally, but with the same effect as if they had been forgeries; and whether the State of Michigan was a *bona fide* purchaser of the debt and securities or not makes no difference. The assignments not being the acts of the corporation, the State acquired no title; the case stands on the same footing as if the assignments had never been made."

The reasoning of the case quoted from applies to the case now under consideration, and was applied by the Supreme Court of New Jersey, in the case of *Stokes v. New Jersey Potter Company*, 46 N. J. L. 237, which case is directly in point. There, as here, a judgment was confessed by the officers of an insolvent corporation without authority from the board of directors, and there was a motion to set it aside in the interest of creditors. After showing that the judgment was void the court said: "Nor can this judgment acquire validity from the fact that the money advanced by plaintiff was applied for the benefit of the company. From that fact a debt would arise, and an obligation on the part of the corporation to pay the debt in common with other debts would result; but the plaintiff can not hold his security which gives him a lien upon the company's property, unless his security is a valid security as an incumbrance thereon, especially when the rights of other creditors are involved. The receiver as the representative of creditors, has the capacity to make the

objection that the security was not made in such a manner as to be binding upon the corporation."

The proceedings in those cases were by receivers and were in the nature of insolvent proceedings instituted by creditors, but the power of the court on creditor's bill in this State is ample to reach all assets of the debtor's in the hands of any person who has obtained them without legal right to hold them, and apply the same in satisfaction of the claims of the judgment creditors.

We conclude, therefore, that the complainants were entitled to a decree against the defendants, A. J. Cross and Richards, that they account for the value of the property seized by them respectively on their void executions, and it was error for the court to dismiss complainants' bill.

The decree will therefore be reversed, with directions to the Superior Court to enter a decree requiring said appellees to account for all property taken by them, or either of them, under their said judgments and executions, and the court will proceed, in accordance with the usual practice in chancery, to find the value of the property so seized by said appellees, and will, on the same being ascertained, decree the payment of the same to the complainants to the extent of their judgments, or to a receiver under complainants' bill, if one shall be appointed, and such other and further proceedings or decree may be had in said case as shall be in accord with the practice of the court and not inconsistent with this opinion.

Reversed and remanded.

HENRY SWANTZ

v.

JOHN MULLER.

Former Adjudication—Riparian Rights—Dam—Successive Actions for Damages—Nominal Recovery—Estoppel.

1. The doctrine of *res adjudicata* extends to the grounds of recovery and defense which might have been but were not presented.

Swantz v. Kuller.

2. Where the owner of lands has brought suit to recover damages for prospective as well as present damages, alleged to have resulted thereto from the erection of a dam and changes in the flow of water, he can not subsequently maintain an action to recover damages for the depreciation in the value of his land.

3. The recovery of merely nominal damages in the first action does not warrant the presumption that the question of permanent injury was not considered by the jury.

[Opinion filed September 19, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This is an action by appellant against appellee to recover damages for continuing and maintaining a certain dam by appellee on his land, by reason of which, it is alleged, the surface waters and watercourses flowed therefrom out of their natural courses upon land of appellant, injuring his orchard, land and barn, and interfering with his business of farming.

The declaration, as amended, contained the usual averments, reciting that he was the owner and possessor of certain lands, together with a certain orchard, orchard grounds and cattle barn thereon; that certain surface waters or watercourses had run and flowed in the natural watercourses or channels from land of defendant in and upon land of plaintiff, south and clear of said orchard, orchard grounds and cattle barn; that plaintiff was a farmer, and used such grounds for raising of vegetables, etc., and that such surface waters irrigated and drained his land; that defendant, on March 15, 1885, wrongfully erected and constructed a certain dam above land of plaintiff, whereby such surface waters were directed from their natural courses and flowed in, upon and through such orchard, orchard grounds and cattle barn; that on the 13th day of June, 1885, the plaintiff commenced certain proceedings in the Superior Court of Cook County for the wrongful erection and construction of said dam against the defendant, and that on the 13th day of March, 1886, he recovered a judgment of one cent damages and costs of suit, and which judgment has never

been reversed, and is now the final adjudication of the rights of the plaintiff and defendant concerning the matters at issue in such proceedings; that defendant, from the day of recovery of said judgment until the commencement of the present suit, wrongfully suffered and permitted the said dam to remain, and be maintained, although requested to remove the same; by reason of said grievances the plaintiff could not use his said land, orchard grounds and cattle barn, and follow his said business in so extensive and beneficial a manner as he otherwise would have done, and was thereby deprived of the use and enjoyment of the same, and of the profits and gains which he otherwise would have made, and thereby the land of the plaintiff became, was and is, depreciated in value.

The declaration of the case now under consideration set out *in haec verba* the declaration in the original suit. The latter declaration consists of three counts, the third of which contained the allegation that the land of plaintiff became depreciated in value; the other two counts made no allusion to such depreciation, but all the elements of damage charged in the declaration in this case were set up and relied on in the declaration filed in the suit first brought.

A demurrer to the declaration was sustained by the court below, and judgment for costs entered against appellant, from which he appeals to this court.

Mr. B. M. SHAFFNER, for appellant.

No technical objection was taken or made to the declaration, but the court below sustained the demurrer on the ground that the recovery of one cent damages in the former suit, for the erection and construction of the dam and obstruction, was a bar to a further recovery for the continuing of the same.

The demurrer admits the continuing of the dam or obstruction, and every continuation thereof is a fresh trespass. *Holmes v. Wilson et al.*, 10 Ad. & El. 503.

Upon the recovery of the judgment, although nominal damages only, it was presumable that appellee would thereupon abate the wrong and nuisance, but instead, he continued and maintained it.

In *McConnell v. Kibbe*, 33 Ill. 178, the Supreme Court say: "The right infringed is property, and for its invasion nominal damages may be recovered; but such recovery is no bar to a suit for actual damages subsequently sustained, where they did not take place before the commencement of the former suit."

The principle of the common law, in cases of this kind, is that successive actions can be brought as long as the obstruction exists. 1 Sedg. on Damages, 280.

And the law does not presume that the wrong will continue, and therefore damages for overflowing lands are limited to those which occurred before the bringing of the action. *Savannah & Ogeechee Canal Co. v. Bourquin*, 51 Ga. 378.

Mr. ARNOLD TRIPP, for appellee.

Per Curiam. The substance of appellant's complaint is the depreciation in value of his land. For that injury he once before sought redress in a similar action. By the showing made in his declaration now before the court, he claimed damages for this identical cause of action in the former suit, and the jury awarded him the sum of one cent. The declaration does not even aver that the question of depreciation was not submitted to the jury in the first case. The allegation, if it were material, can not be supplied by presumption. The failure of the jury to award substantial damages in the first trial, does not warrant us in holding that they did not consider the alleged permanent injury to the land. They may have thought nominal damages full compensation for all the injury, present or prospective. A former judgment is conclusive as to all questions within the issue whether formally litigated or not. The doctrine of *res judicata* "extends not only to the questions of fact and of law which were decided in the former suit but also to the grounds of recovery or defense, which might have been but were not presented." *Beloit v. Morgan*, 7 Wall. 619; *Harmon et al. v. Auditor, etc.*, 123 Ill. 133; *Bennitt et al. v. Star Mining Co. et al.*, 119 Ill. 14.

From that well settled rule we have no desire to deviate.

Applying it to this case, it can not be denied that appellant might have presented for adjudication in the first case all the matters complained of in this, and if he failed to do so, there is now no relief for him.

Whether an erection of a permanent character by an individual for his own convenience, profit or pleasure, having no connection with a public use, but which causes a depreciation in the value of adjoining land, gives a right of action which is entire and can only be sued on by the party owning the land at the time of the injury, we need not here determine. See *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 211, 212.

This case is of that class where the plaintiff has elected to treat the injury as embracing prospective as well as present damages, and has recovered a judgment therefor.

The decision of the Superior Court was not in conflict with *C., B. & Q. R. R. Co. v. Shaffer*, 124 Ill. 112, or *O. & M. Ry. Co. v. Wachter*, 123 Ill. 440.

A distinction upon which this judgment may safely rest, is stated in the opinion in the latter case to be the treatment of the injury by the plaintiff, as embracing prospective as well as present damages. The court then says, that the decisions in such cases rest upon the principle of estoppel, and are consequently sound.

The judgment of the Superior Court is affirmed.

Judgment affirmed.

THE SECURITY INSURANCE COMPANY

V.

AUGUST METTE ET AL.

Fire Insurance—Conditions—Fall of Part of Building—Forfeiture—Strict Construction—Agency—Condition as to Title—Leasehold—Instructions.

1. A condition in a policy of insurance providing for a forfeiture in case of the fall of the building insured, will not be construed as working a forfeiture upon the fall of a part of the building.

Security Insurance Co. v. Mette.

2. Where the building insured is on leased land, a failure to disclose such fact will work a forfeiture under a condition requiring it to be written in the policy.

3. In the case presented, the broker who procured the insurance in question acted as the agent of the assured. The mere delivery of the policy and payment to him of a commission did not constitute him the agent of the defendant.

4. The employment of an adjuster by the defendant before it knew the plaintiff's title was not a waiver of the condition as to title.

5. It is improper to submit an instruction touching a point upon which no evidence was introduced.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

In connection with this case see the following case of the Illinois Insurance Company v. Mette.

Messrs. MILLER, LEWIS & JUDSON, for appellant.

Mr. GEORGE F. WESTOVER, for appellees.

If an agent be informed by the assured of the true condition of his title, the company is bound thereby, even though the agent be not a general agent of the company. *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Commercial Ins. Co. v. Spanknable*, 52 Ill. 53; *Keith v. Globe Ins. Co.*, 52 Ill. 518.

Any of the conditions in a policy of insurance may, in this State, be waived by an agent. *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Home Mutual Ins. Co. v. Garfield*, 60 Ill. 124; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.

And this rule is held, even though the policy of insurance contain the clause, as do the policies in this case, that "any person," other than the assured, who may procure the insurance, "shall be deemed the agent of the assured and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

If the agent of the company knows the facts, even in the absence of any disclosure by the assured, the company can not complain that the title is not stated in the policy. *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *N. E. Fire & Mar. Ins. Co. v. Wetmore*, 32 Ill. 24.

Having knowledge, it is the company's duty to write the policy correctly. *Union Ins. Co. v. Chipp*, 93 Ill. 96.

And if the building be on leased ground, with the knowledge of the agent, the company can not avoid the policy because the fact is not stated therein. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302.

And in dealing with an agent the assured is not bound to know the extent of the agent's authority. *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166.

Thomas Underwood acted as the agent of the insurance companies, and not as the agent of the appellees, *August Mette & Co.*

This is a question for the jury, and the jury has so decided. *Sun Mutual Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99.

GARNETT, J. In this case a judgment was rendered in the court below, on a policy of insurance against fire, in favor of appellees, and appellant, the defendant, appeals therefrom to this court.

The policy of insurance upon which the action is founded, contains the conditions, that "if a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease;" "if the assured is not the sole, absolute and unconditional owner of the land on which such building or buildings stand, by a title in fee simple, and this fact is not expressed in the written portion of the policy, this policy shall be void;" and "it is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, unless he shall have received a commission signed by the officers of this company, appointing him as its agent."

The building insured was a frame ice house 180 feet square under five gable roofs, and was constructed in five compartments, each gable roof covering one of them. Shortly after the policy was issued, the south two fifths of the structure was blown down, leaving the three other compartments standing, and about three fourths filled with ice. A few weeks afterwards the remaining parts of the building were destroyed by fire, and the appellant now claims that the policy was vitiated when the destruction of the two fifths took place. Conditions in policies of insurance are not liberally construed for the purpose of producing forfeitures. "While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured." May on Insurance (2d Ed.) Sec. 175.

The condition in the policy of appellant makes the insurance cease on the fall of the building. Following the sound rule of construction above given, we can not say that the fall of two fifths of the ice house leaving the other three separate compartments standing intact, was a fall of the building within the terms of the condition. Otherwise there is no halting point short of the proposition, that the fall of any substantial part of the building puts the condition in operation, and terminates the risk. The rule requires that the appellant shall be taken to have provided all that was deemed necessary for its security, and that it shall have no benefit from the condition of its own making, until the building shall fall. This identical condition received the attention of the Supreme Court of California in *Breuner v. Insurance Company*, 51 Cal. 101, the conclusion of the court in that case being in harmony with the views here expressed. That the courts are in no haste to broaden this condition in favor of the companies is shown in *Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom*, 80 Ill. 558, where it is said, "so long as the building remained

standing, there could be no exemption for liability, under this clause of the policy, no matter how much depreciation there may have been by the action of the winds or any other cause."

When the policy was executed and delivered, appellees were not, in fact, the owners in fee of the land on which the ice house stood, but held it under a lease, and that fact was not written in the policy. Without explanation, this is a clear violation of the condition secondly above set forth. Appellee's reply is, that one Underwood, who negotiated the insurance, was the agent of appellee; that he was fully informed that appellees only held the property by lease, and that the lease itself was shown to him before the insurance was agreed on. If, in fact, he was the agent of the company, the fact is not changed by that clause in the policy which declares that the person procuring the insurance shall be deemed to be the agent of the insured and not the agent of the company. But we find in the record no evidence tending to prove that Underwood was the agent of appellant when the lease was shown to him. Prior to the transaction in question he had no connection or business of any kind with appellant or its agents, Charles W. Drew & Co., nor did he inform appellant or its agents, that appellees' interest was a leasehold. Underwood was an insurance broker, having a desk in the office of James Ayars & Co., insurance agents. One Breiner, an insurance agent at South Chicago, who had no connection or business relations with appellant or its agents, informed Underwood of the fact that appellee had an uninsured ice house in South Chicago. Underwood, without any communication with appellant, called on appellees to induce them to allow him to place their insurance. After some negotiation, Mette testifies that they finally concluded to let him place the insurance. Appellees did not name the companies, or any of them, from which the insurance was to be procured, but left that and everything else relating to the insurance, except the amount of risks and rates, to Underwood's discretion and judgment. He was not even asked by appellees the names of the companies in which the risk would be taken, nor did he inform them. Before appellant had any communication with Underwood, he had seen and

made all arrangements with appellees for procuring the insurance for them, and came from them to appellant with the description of the property, the amount of insurance they desired, the rate of premium they would pay, and with implied authority to select the companies.

The agents of appellant delivered the policy to Underwood, he delivered the policy to appellees, who paid him the premium, and the agents of appellant paid him, out of their commissions, ten per cent. on the amount of the premium. Delivery of the policy to Underwood, and the allowance of such commission to him, are supposed by appellees to be sufficient proof that he was agent of appellant. On a similar state of facts as to the question of agency, it was held in *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402, that the broker was the agent of the insured. See also *Franklin Insurance Co. v. Weary*, 4 Ill. App. 74; *Kings Co. Fire Ins. Co. v. Swigert*, 11 Ill. App. 590; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 434.

Aside from the delivery of the policy to Underwood and payment of the ten per cent. to him, there is absolutely nothing in the record from which the inference can fairly arise that he was the agent of the company. It necessarily follows that each instruction for the plaintiffs which submitted to the jury the question of Underwood's agency for the defendant was erroneous.

The employment by appellant of an adjuster, to examine into the loss after it occurred, was not a waiver of the condition as to title. There is no evidence that the company or its agents knew appellee's title was a leasehold when the adjuster was engaged. Certainly no intention to waive rights can be inferred, against one entitled thereto, when he is ignorant of the existence of such rights.

The modification by the court of the ninth instruction requested by defendant, erroneously submitted to the jury the question whether Underwood communicated to defendant, at or before the time the policy issued, the fact that the title of the insured to the land was a mere leasehold. No evidence was introduced tending to prove such communication.

The second and fourth of the defendant's refused instruc-

tions being in conformity with the views expressed in this opinion, should have been given to the jury. The court erred in refusing them.

Finding the judgment erroneous in the particulars specified, it must be reversed and the cause remanded.

Reversed and remanded.

THE ILLINOIS MUTUAL INSURANCE COMPANY

v.

AUGUST METTE ET AL.

Fire Insurance—Conditions—Fall of Part of Building—Forfeiture—Agency—Instructions.

1. In an action on a policy of fire insurance, it is *held*: That the question whether the policy was revived or continued in force after a forfeiture, is unimportant, the defendant having failed to charge the defendant with notice of such facts as would prevent a forfeiture under the condition as to title; and that the broker who procured the insurance in question acted as the agent of the assured.

2. It is improper to submit an instruction touching a point upon which no evidence was introduced.

[Opinion filed September 19, 1883.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. MILLER, LEWIS & JUDSON, for appellants.

Mr. GEORGE F. WESTOVER, for appellees.

Per Curiam. By this appeal it is sought to reverse a judgment in favor of appellees in a suit on a policy of insurance. The property insured and the loss thereof by fire are the same which are involved in *Security Insurance Company v. Mette al.*, decided at this term. [*Ante*, p. 324.] The property

Chicago Safe and Lock Co. v. Cremen.

insured by the Illinois Mutual Insurance Company contained a clause exempting the insurer from liability, if the building, or *any part* thereof, should fall, except the fall be the result of fire. In all other points material to this cause the policy was similar to that described in the opinion filed in the case above referred to, and the facts are substantially the same, except those concerning the continuance of the policy in force after the fall of part of the building. On the trial the appellee made an effort to prove that the policy was revived or continued in force by the company after the fall of the south two fifths of the building. But this attempt can have no influence on the result so long as there is a failure to charge the company with notice of such information as was given to Underwood concerning the title of appellees to the land on which the building stood.

In other respects than that of the condition as to the fall of the building, this case is controlled by the decision in the Security case. It is shown by the opinion in that case there was no evidence tending to prove Underwood's agency for the company, and hence it was error to submit that question to the jury.

The judgment of the Circuit Court is reversed and remanded.

Reversed and remanded.

CHICAGO SAFE AND LOCK COMPANY

v.

MICHAEL CREMEN.

Sales—Safe—Rescission—Notice—Instruction.

In an action to recover the contract price of a safe, wherein the defendant contends that the door was so defective as to render the safe useless, this court holds that an instruction based upon this hypothesis but ignoring the question of notice and the contention of the plaintiff that the defendant failed to close the door properly, was improperly given.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. W. W. RATHBUN, for appellant.

Mr. PERRY A. HULL, for appellee.

MCALLISTER, J. This was an action by the appellant corporation, engaged in the business of manufacturing fire proof safes, against the appellee, to recover upon an executory contract for the sale by the former to the latter of a safe of a particular description, the agreed price thereof. The plaintiff introduced the contract in evidence and evidence tending to show that it delivered to the defendant a safe answering the description in such contract. The defendant introduced evidence tending to prove that the safe so delivered was useless for the reason that when he began using it, he found that, when the outer door was closed, it could not be opened without tipping the safe forward and down toward the floor, to accomplish which required certain implements and the services of several men. To meet that feature of the case, the plaintiff introduced two witnesses who were experts in the business of manufacturing safes for plaintiff, and they gave testimony tending to prove that the difficulty in opening said door of the safe was not due to any defective construction, but to the fact that the defendant did not, before closing said outer door, properly attend to the closing of a certain inner door of the safe and place things in their just position, which was a simple and practicable thing to do.

On behalf of the defendant the court gave this instruction to the jury:

"If the jury believe from the evidence that the safe in question was manufactured by the plaintiff, and sold to the defendant to be used by him in his business, and that the same at the time of such sale and delivery was out of condition or repair to such an extent as to render the safe useless, or so as

to prevent the defendant from unlocking or opening the door to the same, and that the same has remained in the same condition ever since such delivery, and has been unavailable and useless to the defendant for the purpose for which it was made and sold, owing to such condition, and that the defendant notified the plaintiff of such defective condition of the safe, then the plaintiff can not recover in this suit and the law is with the defendant, and the jury should find for the defendant and against the plaintiff."

The jury found for the defendant, and the court, overruling plaintiff's motion for a new trial, gave judgment on the verdict, from which plaintiff took this appeal.

If the difficulty as to opening the outer door of the safe was due principally to defective construction and the defendant gave the plaintiff, after reasonable time to test it, immediate notice to take it away, then the contract was rescinded and no recovery could be had for the price. 2 Kent's Com., Marg. pp. 479, 480; Doane v. Dunham, 65 Ill. 512; Babcock v. Trice, 18 Ill. 420; Howard v. Hoey, 23 Wend. 350.

But the controlling issue upon the trial was upon the contention of the plaintiff that the difficulty in opening the outer door of the safe was wholly due to the defendant's own want of care and attention, as respected the manner of closing an inner door, and putting it in the right position for closing the outer door. It will be perceived that in the above instruction that issue is entirely ignored. As the case stood upon the evidence that was error. The instruction also fails to submit to the jury the question whether the defendant immediately upon discovering the defect notified the plaintiff to take the safe back and so rescinded the contract. For giving that instruction the judgment must be reversed and cause remanded.

Reversed and remanded.

BARTHOLOMEW CUNNINGHAM

V.

WILLIAM L. WRIGHT.

Practice—Justice—Absence of Plaintiff—Sec. 33, Chap. 79, R. S.—Discretion—Setoff—Motion to Quash Execution and Release Levy.

1. In an action before a justice of the peace, if the plaintiff or his agent does not appear, the justice must dismiss the suit, unless the defendant consents to a continuance. The rule is imperative, and the case is not altered by the fact that the defendant claims a setoff.

2. Where, in the absence of the plaintiff, the justice has entered judgment for the defendant, and the latter has filed a transcript in the office of the clerk of the Circuit Court, a motion to quash an execution issued thereon and release a levy thereunder will be granted.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

March 30, 1887, appellant and one James O'Donnell, as co-partners, brought suit before Peter Foote, a justice of the peace, against appellee; the summons was made returnable April 11, 1887, at 9 o'clock A. M. At 10 o'clock on April 11th, the return day of the summons, the case was called by the justice and continued until April 18th, at 9 o'clock A. M. It does not appear that either of the parties appeared or were present at the time of the continuance on April 11th.

On April 18th, at 10 o'clock A. M., the justice called the case. The transcript of the justice shows affirmatively that the plaintiff failed to appear, but the defendant, being present, was sworn and testified, and upon his testimony the justice rendered judgment against the plaintiffs and in favor of the defendant for \$69 and costs of suit. May 10th an execution was issued on such judgment, which was returned July 19th unsatisfied. After the return of such execution the appellee, who was the defendant before the justice, procured a transcript

from the justice, which he filed December 12, 1887, in the office of the circuit clerk, under the provisions of Secs. 95, 96 and 97, of Chap. 79 of the Revised Statutes. December 20, 1887, the circuit clerk issued an execution on such transcript, which execution was levied upon the goods and chattels of appellant. December 31, 1887, appellant moved the Circuit Court, appellee being present, to set aside such judgment, to quash the execution and to order the levy thereunder released, on the hearing of which motion the transcript was offered in evidence; but appellee objected to the granting of such motion, and the same was denied by the court, which ruling and decision of the court is here assigned as error.

Mr. PERRY A. HULL, for appellant.

Messrs. JOHN H. ROLLINS and SYDNEY STEIN, for appellee.

GARNETT, J. The transcript of the justice of the peace shows a continuance at the time the summons was returnable, without showing whether either of the parties appeared. But it also shows affirmatively that the plaintiff did not appear at the time to which the suit was continued, and we have no hesitation in saying the record thus proves by its own terms that the justice then lost all jurisdiction of the case.

Sec. 33 of Chap. 79 of the Revised Statutes is so plain and unambiguous there is no room for construction. It furnishes the exclusive rule for the action of the justice in such cases. It provides that if the plaintiff or his agent shall not appear at the time appointed for trial, in any suit, and no sufficient reason shall be assigned to the justice why such plaintiff or his agent does not appear, the justice shall dismiss the suit, unless the defendant shall consent that such suit shall be continued to another day.

The case is not altered by the fact that the defendant has cross-claims against the plaintiff. The court, in a suit before a justice, is not, as in courts of record, vested with the power to proceed to a trial on account of the defendant having an offset. The justice has no discretion.

The command of the statute to dismiss is peremptory, except in the case specified. The question presented to the justice who rendered the judgment in question was not one calling for his opinion on any question of law or fact with regard to which he was liable to error, but it was a question as to the actual existence of a fact about which there was no liability of mistake.

"Whenever a question is one of opinion merely, whether it be of value, or of the weight to be given to evidence legally admitted, there is no doubt discretion is subject to no dispute. But when the right to act depends on the actual existence of facts, nothing short of such actual existence will suffice, and opinion is no account." *Wall v. Trumbull*, 16 Mich. 250.

The judgment of the justice was without jurisdiction. The court below erred in refusing to quash the execution and to order the levy thereunder released.

The order of the Circuit Court is reversed and remanded.

Reversed and remanded.

SARAH WOLF

v.

F. W. MICHAELIS.

27	336
126	71
27	336
77	202

Mechanic's Lien—Architect's Certificates—Defective Bill—Evidence—Improper Admission of—Secondary Evidence.

1. Where a contract for labor and materials to be used in the erection of a building requires a certificate from the architect before each installment becomes due, a bill for a mechanic's lien can not be maintained, unless it appears that such stipulation has been complied with, waived or excused in some manner recognized by law.

2. In the case presented, in the absence of any allegation that the architect ever issued or refused to issue the certificates required, or statement of any matter of excuse for failure to secure such certificates, the evidence touching the question was improperly admitted.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Mr. MOSES SALOMON, for appellant.

Mr. LEVI SPREAGUE, for appellee.

GARNETT, J. This is an appeal from a decree for a mechanic's lien for \$1,450 in appellee's favor against the property of appellant. The contract between the parties was in writing (Edward G. Ellicock being named therein as the architect), and by its terms appellant was to pay appellee \$5,450 for the work and materials specified.

The contract price was to be paid in six installments, the first, second and third amounting in the aggregate to \$2,000, to be paid at various stages of the work; the fourth (\$2,000) when the building was finished, the fifth (\$1,000) thirty days thereafter, and the sixth (\$450) in six months thereafter. But in the contract it was provided "that in each case of said payments a certificate shall be obtained from and signed by the said Edward G. Ellicock, architect, to the effect that the work is done in strict accordance with drawings and specifications, and that he considers the payment properly due; said certificate, however, in no way lessening the total and final responsibility of the contractor." The bill makes no allegation that the architect ever issued or refused to issue any certificate, nor is any fact therein stated as an excuse for not securing certificates for the amounts claimed.

The answer of appellant sets forth the written contract *in haec verba*, and alleges that certificates for the installments sued for were not obtained by complainant. The bill should have averred the issuing of the certificates or that they were fraudulently withheld by the architect. *Barney v. Giles*, 120 Ill. 154; *Barton v. Herman*, 11 Abb. Pr. (N. S.) 378.

As said by the court in *Barney v. Giles*, *supra*, "The contract being the foundation of the petitioner's proceeding, and being in all respects lawful and valid, it can be enforced only

as the parties have made it." On the hearing, parol evidence was introduced over the objection of the appellant, tending to show that a certificate had been made and delivered by the architect to appellee for \$300 remaining unpaid on the fourth installment. If that was material evidence, its reception was error, as no foundation was laid for secondary evidence. There was nothing else tending to prove the making and delivery of such certificate. For the same purpose, a record of judgment in favor of appellee against appellant for said \$300 was introduced in evidence by appellee. But all the evidence upon which that judgment was rendered is not given in this record, and for aught that appears the judgment may have been based on a waiver of the certificate and a distinct promise of appellant to pay that amount. There was no averment in the bill warranting the introduction of any evidence on this question and it should all have been excluded.

But, if it had been satisfactorily proven that a certificate was given by the architect for the balance of the fourth installment, that would not excuse appellee from securing and presenting certificates for the fifth and sixth installments. The fifth was not payable until thirty days after the completion of the building, and the sixth was postponed six months. If the work and materials appeared all right when completed, serious defects might have been discovered before either of the last two installments became due. The contract between the parties is framed in terms that leave no room for construction as to the necessity of a certificate before each installment became due. Until that stipulation in the contract is complied with, waived or excused in some manner recognized by law, there can be no recovery. The allegations of the bill are fatally deficient in this respect. The decree is reversed and remanded.

Reversed and remanded.

Morrison v. Herrick.

EDWARD W. MORRISON ET AL.

V.

HARRY HERRICK ET AL.

Landlord and Tenant—Oral Agreement for Extension of Term—Part Performance—Statute of Frauds—Specific Performance—Cross-Bill—Possession as Notice.

1. Where a lessee in possession makes valuable improvements with the knowledge of the lessor, and on the faith of an oral promise by the latter to execute a lease extending the term, the making of such improvements constitutes such part performance as will take the case out of the statute of frauds.

2. In such a case a bill lies for a specific performance of the oral agreement for a lease.

3. In the case presented, a demurrer to the cross-bill filed by subsequent lessees was properly sustained.

4. The possession of a tenant is constructive notice of his rights to a subsequent lessee.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Bill in equity, filed by appellees, praying specific performance of an oral agreement made by Edward W. Morrison with appellees for a lease of the store and basement of premises known as number 115 Madison street, and basement of number 113, Chicago, for a term of five years. Morrison's answer denies making the agreement, and sets up the statute of frauds. The appellants, Miner, Beal & Company, filed a cross-bill against Morrison and appellees, praying for possession of the premises, appointment of receiver to collect the rents of appellees, etc. To the cross-bill a demurrer was filed and sustained. Hearing, and decree of specific performance on amended bill, from which Morrison and Miner, Beal & Company appeal.

Mr. S. K. Dow, for Edward W. Morrison, appellant.

Messrs. L. H. BOUTELLE and M. W. FULLER, for Miner, Beal & Co., appellants.

In order to take an oral agreement in respect to an interest in land, not to be performed within one year, out of the operation of the statute of frauds, (if it is sought to do this by proving that valuable improvements have been made upon the premises by the lessee or grantor, as the case may be,) upon the good faith of the oral agreement, it must be clearly shown that such improvements were made by the party while in possession of the premises, acquired under and by virtue of the oral agreement sought to be enforced, and not otherwise. This is the settled law of Illinois. *Wood v. Thornly*, 58 Ill. 464; *Padfield v. Padfield*, 92 Ill. 198; *Bohanan et al. v. Bohanan*, 96 Ill. 691; *Warren v. Warren*, 105 Ill. 568; *Kaufman v. Cook*, 114 Ill. 638; *Long et al. v. Long*, 118 Ill. 638.

The proof must clearly establish the oral agreement. The improvements must be valuable. The improvements must be made under a possession acquired by virtue of the oral agreement.

Messrs. SMITH & FORCH, for appellees.

The general principle so often declared, that part performance will, in equity, take a parol agreement out of the statute of frauds, has, since a very early period, been applied by the courts of England to agreements for leases. If the tenant has been put to expense on the faith of a promise of a lease, equity will decree its execution. *Earl of Aylesford's Cases*, 2 Strange, 783, and note.

Where possession alone is relied upon as part performance, of course, such possession must be taken after the parol agreement, and in pursuance of, or rather as a consequence of, such agreement. And if, at the time of the agreement, the complainant be in possession under a lease, whether expired or not, his possession will be referred to this lease, and of itself will be no evidence of a new agreement for a further lease. *Pomeroy on Contracts*, Sec. 123-125.

But where the part performance consists of valuable improvements and large outlays (always considered the strongest and most unequivocal acts of part performance), then the fact of possession cuts no figure, provided these improvements and outlays are of such an extent and kind that they are reasonably referable to an agreement for a new lease, and not reasonably or rationally referable to the prior tenure of holding. Pomeroy on Contracts, Secs. 124 and 125; Fry on Specific Performance, Secs. 401 and 402; Browne on Statute of Frauds, Sec. 487.

The ground of equitable relief in this class of cases is of a much broader character, more especially as it is applied in later years. It proceeds upon the broad ground of equitable estoppel, or estoppel by conduct, as it is sometimes termed—a principle of comparatively modern growth, and which is being extended and enlarged from year to year in its application by the courts. *City of Chicago v. Gage*, 95 Ill. 615.

This principle of estoppel by conduct is applicable to every conceivable case where a party by his acts or declarations, or even by his silence (where honestly he should speak), deliberately induces another to act, either by changing his situation or pursuits, or in the expenditure of money in improvements or otherwise, or in binding himself by contract, etc., so that he can not gainsay what he has said or done without being guilty of bad faith toward the party whom he has thus induced to act. In such case he will be estopped in equity. And this principle is applied to the regulation and control of titles to, and interest in, real estate, as well as to other property rights. *Broom's Legal Maxims*, 173, 174; *Russell v. Hubbard*, 59 Ill. 335; *Favill v. Roberts*, 50 N. Y. 222; *Truesdail v. Ward*, 24 Mich. 118.

Says Roberts, in his admirable work on Frauds: "There does not seem, indeed, to be any satisfactory foundation for this doctrine of part performance without the intermixture of fraud, and upon this ground, where an owner has encouraged another to go on with his improvements on the estate under a false expectation of a conveyance or lease raised in him by the assurance of the party entitled, it is agreeable to the general

course of equitable relief to disappoint the contrivance by compelling the deceiver to realize the expectation he has created. This protecting jurisdiction has, indeed, stretched itself to those cases where the illusory hope has been raised, not by words and assurances, but simply by looking on in silence, while false impressions, which we are able either to correct or verify, are inducing a fruitless expenditure on improvements. This equity is strong and salutary, and the jealousy of jurisdiction has shut out the statute of frauds where this principle of relief applies." Roberts on Frauds, p. 132; Parkhurst v. Van Cortland, 14 Johns. 15; Harris v. Knickerbocker, 5 Wend. 642; Ryan v. Dox, 34 N. Y. 307-313; Peiffer v. Stillwater & St. Paul R. R. Co., 23 Minn. 342; Fery v. Pfeiffer, 18 Wis. 510; Seaman v. Aschermann, 51 Wis. 678; Pomeroy on Contracts, Sec. 106 *et seq.*, and cases there cited in notes; Story's Eq. Juris., Secs. 761-763.

The English cases upon this subject, and especially cases of agreements for leases, or for renewals or extensions of leases, are numerous. And these cases, especially recent ones, assert and apply this principle of estoppel by conduct to the fullest extent. Parker v. Smith, 1 Collyer's Ch. Reps. 608; Cole v. Pilkington, 19 Rep. Eq. Cas. 174; Williams v. Evans, L. R. 19 Eq. 547.

Our Supreme Court has applied the same broad principle of equitable estoppel to this class of cases. Warren v. Warren, 105 Ill. 568; Irwin v. Dyke, 114 Ill. 302. See, also, Mundy v. Jolliffe, 5 Milne & Craig, 167; Wright v. Pucket, 22 Gratt. 374; Haigh v. Kay, Law Reps., 7 Ch. 469; Caton v. Caton, L. R. 1 Ch. 137. See, also, Neale v. Neale, 9 Wall. (U. S.) 1-12; Swain v. Seamans, 9 Wall. (U. S.) 254.

GARNETT, J. The appellee, Harry Herrick, commenced to occupy number 115 Madison street, Chicago, in 1876, as a hat store. His brother, Charles K. Herrick, engaged in business with him in 1880 at the same place. The landlord, Edward W. Morrison, executed a lease for the premises annually, the last executed being dated April 8, 1884, and the term ending April 30, 1885, at a rental of \$3,000 per year. We think the

Morrison v. Herrick.

evidence fairly proves that in the summer of 1884 a parol agreement was made between Morrison and appellees, by the terms of which Morrison undertook, on the faith of appellee's promise to make permanent and valuable improvements on said store, to give them a lease of said store and basements for a term of five years, beginning May 1, 1885. At the time the oral agreement was entered into, appellees were in the actual possession of the premises, engaged in the business of hatters, and have been in such possession and occupation ever since. Soon after the agreement was made appellees proceeded, in pursuance thereof, with the knowledge and consent of Morrison, to make valuable and permanent improvements on said store, at a cost of several thousand dollars. No written lease was delivered by Morrison for the year beginning May 1, 1885, nor for the five year term. On the 8th day of July, 1885, he executed to Miner and others, appellants herein, a lease of said store, with other stores adjoining, for a term of five years beginning May 1, 1886, under which the last named lessees now claim the superior right to possession of the store number 115.

What amounts to part performance of an oral contract for the sale of real estate (or such an interest therein as is specified in the various statutes) so as to shut out the statute of frauds, has been the occasion of no little contention in the courts of this country and England. The doctrines announced at times, have been so extreme as to give rise to the apprehension that nothing would be left of the statute. We may safely say, however, that the ruling idea with the courts has been to prevent the use of the statute in that class of cases, as a means for the perpetration of fraud. What is often designated as part performance which takes a contract out of the statute, may be as appropriately classified with those cases in which the doctrine of equitable estoppel operates to prevent fraud. That doctrine, certainly, the statute of frauds was not intended to repeal.

In Roberts on Frauds, 132, it is said: "There does not seem, indeed, to be any satisfactory foundation for this doctrine of part performance without the intermixture of fraud, and upon

this ground, where an owner has encouraged another to go on with his improvements on the estate under a false expectation of a conveyance, or lease, raised in him by the assurance of the party entitled, it is agreeable to the general course of equitable relief to disappoint the contrivance, by compelling the deceiver to realize the expectation he has created."

Again, at page 134, he says: "But these instances of encouragement, either tacit or express, to make improvements, incur expense or exercise acts of dominion, which must turn to the prejudice of the mistaken party if his expectation is disappointed, are not proper cases of part performance, but of actual fraud, which courts of equity have always been forward to relieve against." This point is illustrated in *Howe v. Hutchinson*, 105 Ill. 576; *McClure v. Otrich et al.*, 118 Ill. 320.

As a head of relief, separate from that of taking possession in pursuance of the contract, Pomeroy, in his work on Contracts, Sec. 126, considers the subject of making valuable and permanent improvements in pursuance of the oral contract, with the knowledge and consent of the vendor, saying, "it is always considered to be the strongest and most unequivocal act of part performance, by which a verbal contract to sell and convey, or to lease, is taken out of the statute. It is very plain that such proceedings satisfy the equitable principle upon which the doctrine of part performance rests much more completely than a mere possession does. If the purchaser has simply taken possession, it might seem possible for him to be restored to his former situation, and to be compensated in damages; but when he has made outlays for valuable and permanent improvements and thus changed the character of the property, it would be in the highest degree unjust for the owner, who has permitted these expenditures and alterations to be made in reliance upon the agreement, to interpose the statute and prevent the completion of his contract, and at the same time retain and enjoy all the benefit of the additional value imparted to the land." And in the same work, Sec. 124, the author says: "It is also well settled that a tenant's continued possession and the making by him, in pursuance of stipu-

lations contained in the agreement, of substantial improvements on the land, constitute a part performance of a verbal agreement to grant a renewal of the lease, or, it would seem, of a contract to convey the fee." See also Fry on Specific Perf., Sec. 585.

A case in point decided by Lord Cottenham, is *Mundy v. Joliffe*, 5 Myl. & C. 167, where the tenant from year to year, during such tenancy entered into a parol agreement with his landlord for a lease for fourteen years, and in pursuance thereof repaired the building, drained the lands, etc. It was held that there was no doubt these acts constituted a part performance which prevented the application of the statute of frauds.

In *Williams v. Evans*, L. R. 19 Eq. 547, a tenant in possession made a parol agreement for a new lease for thirty years, and on the faith of such parol agreement sub-let at an increased rent. The sub-tenant made permanent and valuable improvements with the knowledge of the landlord, and with the understanding that he was to have a lease from the original tenant. The court held that when the tenant is in possession and does anything which alters his position for the purpose of carrying out the new verbal contract, the statute of frauds can not be interposed as a bar; that it was of no consequence whether the improvements were made by the tenant or sub-tenant, and there was a decree for specific performance.

The question we now decide was not presented in *Wood v. Thornly*, 58 Ill. 464, *Padfield v. Padfield*, 92 Ill. 198, or *Pickrell v. Morse et al.*, 97 Ill. 220.

The appellees being continuously in possession of the premises, are not guilty of *laches*. *Whitsitt v. Trustee, etc.*, 110 Ill. 126; *McNamara v. Garrity*, 106 Ill. 384.

The appellants, *Miner, Beal & Co.*, are not *bona fide* purchasers, having paid no purchase money, (*Brown v. Welch*, 18 Ill. 343,) and the possession of appellees being notice to them. (*C., B. & Q. R. Co. v. Boyd et al.*, 118 Ill. 73.)

We are satisfied the decree on the amended bill is right and works out full justice to all parties.

The demurrer to the cross-bill of *Miner, Beal & Co.*, was

Vol. 27.] Chi. Gas Light & Fuel Co. v. Town of Lake.

properly sustained. Their remedy against Morrison is complete and adequate at law. The appellees have no interest whatever in the controversy between the appellants, and may justly object to being entangled in a litigation not germane to the original bill.

Finding no error in the record, the decree of the Circuit Court is affirmed.

Decree affirmed.

THE CHICAGO MUNICIPAL GAS LIGHT AND FUEL COMPANY
V.
THE TOWN OF LAKE.

Municipal Corporations—Gas—Ordinance Granting Authority to Lay Pipes—Failure of Performance—Injunction.

This court affirms a decree dismissing a bill filed by a gas company to enjoin a municipal corporation from interfering with the complainant in laying gas pipes in its streets, there being a failure of performance on the part of the complainant within the time limited in the ordinance granting it the right to lay such pipes.

[Opinion filed September 19, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. FRANCIS ADAMS, for appellant.

The ordinance and the acceptance of it and acting under it by appellant, constituted a binding contract between appellant and the town, which the town, without appellant's consent, was powerless to annul or set aside. Dillon on Mun. Corp., 3d Ed., Secs. 314, 450; City of New Orleans v. Wardens, etc., 11 La. Ann. 244; City of Chicago v. Sheldon, 9 Wall. 53; City of Quincy v. Bull et al., 106 Ill. 337; City of Burlington

v. Burlington Street Ry. Co., 49 Ia. 144; Railway Co. v. Village of Carthage, 36 O. St. 531; Springfield Ry. Co. v. Springfield, 35 Mo. 674.

The acceptance of such a grant, if made directly to the State, would constitute an irrevocable contract between the State and the grantee, and very slight circumstances are sufficient from which to infer acceptance. Morawetz on Corporation, Secs. 23, 24. The analogy between a grant from the State and one from a municipal corporation, acting within its charter limits, is obvious, and was evidently perceived and applied by the learned judge who wrote the opinion in *City of Quincy v. Bull*, 106 Ill. 337.

There is no reason why the law applicable to grants made by the State and accepted by the grantee should not also be applicable to similar grants made by a municipal corporation and accepted by the grantee.

If, as contended, the company, by accepting and acting under the ordinance prior to April 23, 1884, acquired vested and irrevocable rights, this, of course, is decisive of the case; but the evidence of appellant's acts after April 23, 1884, the date of the alleged repealing ordinance, is worthy of consideration, as showing appellant's good faith.

Appellant, not being willing, on account of the uncertainty occasioned by appellee's conduct in attempting to repeal the granting ordinance, and its subsequent hostile attitude, to expend money in the purchase of land on which to erect and construct gas works, procured from the Chicago, Rock Island & Pacific Railway Company, October 23, 1884, a lease of that company's gas works, with the privilege of constructing entirely new works on the premises adapted to the Springer process of manufacturing gas.

Courts of equity will decree specific performance of contracts in respect to personal property, "where the measure of damages resulting from the non-performance of the agreement is uncertain or difficult to ascertain, or where the thing contracted for has to the complainant some intrinsic or special value, or the like." *Cohn v. Mitchell et al.* 115 Ill. 124, 131.

This is not a case for the specific performance of a contract

strictly so called. It is not prayed that the appellee be decreed to do anything which it has, in terms, agreed to do, but merely that it shall not unlawfully interfere with appellant in the exercise of the privileges which appellant undoubtedly possesses, or disturb appellant in the enjoyment of its vested rights.

Messrs. DEXTER, HERRICK & ALLEN, for appellee.

It is well settled that the provisions of the act for the incorporation of cities and villages only apply to such municipalities as are incorporated under it. *Guild v. Chicago*, 82 Ill. 472, 476; *Binkert v. Jansen*, 94 Ill. 283; *Town of Sparland v. Barnes*, 98 Ill. 595; *Champaign v. Harman*, 98 Ill. 491; *C. P. Co. v. Chicago*, 88 Ill. 221.

As the grant in the section relied on has reference only to cities and villages incorporated under the act, so does the proviso. It is familiar law that a proviso is to be limited in its effect to the enacting clause. *In re Webb*, 24 How. Pr. 247; *Detroit v. Detroit, etc., Co.*, 12 Mich. 333; *Pearce v. Bank*, 33 Ala. 693; *Sedg. Const. L. (2d Ed.)* p. 49, and notes; *Wilberforce on Sts.*, p. 303.

The claim of the complainant is, that from the time the alleged contract went into effect, it had a right by contract to enter upon and occupy with its pipes any of the streets of the town, and that it was then entitled, and is therefore now entitled to a specific enforcement of the contract. But what corresponding obligation did the complainant assume?

It is true its right was conditional on its furnishing gas to the inhabitants of the town within one year. But there was no undertaking on its part to do so. If it chose not to fulfil the condition the grant would fail. There was a mere option in its favor, and the essential element of mutuality was, therefore, lacking.

But, if it is conceded that there was mutuality of obligation, clearly there was no mutuality of remedy. The undertaking of the complainant, if any, was to erect works and to furnish gas to the inhabitants of the town within one year.

It is well settled that this was not such an undertaking on

Chi. Gas Light & Fuel Co. v. Town of Lake.

the part of the Municipal Gas Company as a court of equity could specifically enforce. It involved the purchase of land, the erection of works, the laying of pipes and other improvements, and a continuous service. Equity can not specifically enforce such an undertaking.

As the alleged contract could not be specifically enforced by the town against the complainant, it can not be specifically enforced by the complainant against the town. *Marble Co. v. Ripley*, 10 Wall. 339; *Blackett v. Bates*, L. R. 1 Ch. App. 117; *Johnson v. Ry. Co.*, 3 D. M. & G. 914; *Peto v. R. R. Co.*, 1 Hem. & Miller, 468; *Ross v. R. R. Co.*, *Woolworth*, 26; *Johnson v. Ry. Co.*, 22 Grant (U. C.), 290; *Fallon v. R. R.*, 1 Dill. 121; *Ranger v. R. R.*, 1 Eng. Ry. & C. Cas. 50; *Kansas Co. v. Topeka Co.*, 135 Mass. 34; *Buck v. Smith*, 29 Mich. 166; *Cooper v. Pena*, 21 Cal. 403; *Mastin v. Halley*, 61 Mo. 196.

Per Curiam. This is an appeal from a decree dismissing appellant's bill, which sought to enjoin appellee from interfering with appellant in laying gas pipes in the streets of said town, under an ordinance passed March 25, 1884, by appellee's board of trustees.

Section 3 of the ordinance required appellant to "commence furnishing gas to the town of Lake within one year from the date of the passage of this ordinance, and the price of gas to consumers shall not exceed two dollars and fifty cents per thousand cubic feet." etc.

The Chicago, Rock Island and Pacific Railroad Company had gas works erected on its own property in the town, which, in October, 1884, were leased to Theodore G. Springer, for two years, the lease binding Springer to put into the works what was known as the Springer process for manufacturing gas, and the railroad company reserving the right to purchase from Springer, at cost, all his improvements and apparatus at the expiration of the term. There was an understanding between Springer and Morse, the president of the gas company, that the lease was for the company; the gas works were taken possession of by the company and improved by it, and the lease was assigned to it by Springer, February 18, 1885.

The lease gave Springer the right to lay gas pipes on the ground of the railroad company, but made no provisions for extending them further.

Neither lessor nor lessee had any right to lay pipes in the streets of the town. Before March 25, 1885, the works were prepared to manufacture gas, the railroad and its employes residing on its property being supplied with the article from the new gas works. But notice was not given to the town authorities of appellant's readiness to commence furnishing gas, nor was there any public announcement thereof made.

The record fails to show that the railroad company was advised of the interest of the gas company in the works. There was no sign on or about the works indicating the proprietorship of appellant, and, in fact, its interest seems to have been known to only two of its officers, while it remained a profound secret to every other person. No attempt was made to extend pipes from the works into the streets of the town until May 9, 1885. At that time the police of the town interfered and forcibly prevented appellant's employes from laying any pipe, the town authorities denying the right of appellant, then or at any time thereafter, to any of the privileges provided for in the ordinance. We think it plain, from this statement of facts, that appellant never performed its part of the contract, the spirit of which required something more of appellant than the building of gas apparatus under cover, and withholding all knowledge thereof from those who were to receive its advantages, until the year specified in the ordinance had elapsed. Secrecy for upward of a year could no more be justified than for five years. Consumers could not use the gas unless informed of appellant's readiness to supply the same. Appellant is not excused by the fact that it was enjoined from laying pipe, nor by the passage by the board of trustees of an ordinance April 23, 1884, for the repeal of the ordinance of March 25th. The injunction was dissolved April 25, 1884, after which time more than a year elapsed before any steps were taken for extending pipes from the works into the street. The repealing ordinance was of no force, if appellant had, as it claims, accepted the ordinance of March 25th. There was

C. & N. W. Ry. Co. v. Johnson.

nothing to prevent appellant proceeding with its duties under the latter ordinance after the dissolution of the injunction. No force was used until the failure of appellant to comply with the ordinance for more than a year after the dissolution of the injunction. The repealing ordinance was nothing more than the wrongful assertion of appellee's right to rescind the contract.

The decree of the Circuit Court is affirmed.

Decree affirmed.

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY
V.
ANDREW JOHNSON.

Master and Servant—Personal Injuries—Law of Another State—Question for Jury—Instructions—Special Findings—Practice.

1. An instruction stating an abstract principle of law which is pertinent to the case, can not be assigned as erroneous, unless it has a tendency to mislead the jury.

2. The law of another State is matter of fact to be determined by the jury from the evidence introduced. An instruction stating the law of another State would, therefore, be improper.

3. Where a party desires to have requests for special findings more fully answered by the jury, he should move the court to send them back for that purpose. In the absence of such a motion he can not assign a failure to answer certain questions as a ground for a new trial.

4. In an action by an employe against his employer, to recover damages for injuries alleged to have resulted from a dangerous act out of the scope of his employment, which he was ordered to perform by the defendant's foreman, while employed in another State, it is *held*: That the issues of fact involved were fairly submitted to the jury; that the court properly refused to give an instruction stating the law of the State in which the plaintiff's injuries were received; and that the special findings were not inconsistent with the general verdict for the plaintiff.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the
Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. W. B. KEEP and W. C. GOUDY, for appellant.

Mr. ALEX. CLARK, for appellee.

MORAN, J. Appellee recovered a judgment in the trial court for injuries received while in the service of appellant at Escanaba, Michigan. Appellee was employed to assist in loading vessels with iron ore, and while so engaged he contends that he was ordered by appellant's foreman in charge of the dock, to perform a difficult and dangerous act and one which was outside of the scope of his employment, the dangers of which were known to appellant, but unknown to appellee; that he was directed by said foreman to perform an act which required special skill, which he did not possess, to wit, to stand upon a high, unprotected platform, and free from the chute on which it had become entangled and fastened, the rigging of a vessel that was being moved along the dock; and that while obeying such order, and in the exercise of due care on his part, he was precipitated to the deck of the vessel and received injuries which were the basis of the action.

Appellant's contention was, that it was part of the ordinary duties for which appellee was employed to disengage the rigging of vessels being loaded at the dock, whenever the same was caught on one of the projecting chutes; that such caught or entangled ropes were sometimes pushed off by the hands and sometimes worked or pried off by means of a pole or iron bar. Appellant also contended that appellee was not in the exercise of ordinary care for his own safety, and that he was injured through his own negligence.

The issues of fact raised by these contentions were fairly left to the jury. We have examined the instructions and we are satisfied that no error of law was committed by the court in the instructions given to the jury. The first instruction given for the plaintiff is complained of on the ground that there was no evidence in the case on which to base the principle stated. Said instruction is as follows: "The jury are instructed for the plaintiff that it is the duty of the master to use reasonable diligence to ascertain, before ordering a servant to per-

form an act, whether the same is within the scope of his employment and can be performed without risk not incident to the same."

It will be observed that the instruction contains no hypothesis based on the evidence, but states simply an abstract proposition, legally correct and pertinent to the case. Such instructions can not be assigned as erroneous, unless they have a tendency to mislead the jury. *Corbin v. Shearer*, 3 Gilm. 482; *Bandalow v. The People*, 90 Ill. 218; *International Bank v. Jones*, 20 Ill. App. 125.

The other instructions for the plaintiff announced correct rules of law as to plaintiff's right to recover if the jury found the facts as in said instructions are supposed. *Lalor v. C., B. & Q. R. R. Co.*, 52 Ill. 104.

Complaint is made that the court refused to give the following instruction asked by the defendant:

"8. The jury are further instructed that if they believe from the evidence that this accident happened in the State of Michigan, then the law in that State determines whether the plaintiff has a right of action against the defendant, and that, as a matter of law, the plaintiff is not entitled to recover, if you believe from the evidence in this case that the plaintiff was guilty of any negligence that contributed in any respect, either directly or approximately, to the injury complained of."

This instruction was properly refused by the court. To have given it would be for the court to have invaded the province of the jury, and have taken from them the decision of a question of fact.

Though evidence tending to show what the law of Michigan is was introduced in the form of an opinion of the Supreme Court of Michigan contained in a bound volume of the reports of the Supreme Court of that State, yet it was for the jury to find that law, being the law of a foreign State, as a question of fact. To questions of fact the jury must respond.

While the law of a foreign country or State will, when found as a fact, be for the court to construe, if any construction shall be required, the court can not, without submitting the *factum* as to the foreign law to the jury, instruct them as to

what it is. While this doctrine may appear to be somewhat anomalous, it is well established by authority. *Cecil Bank v. Berry*, 20 Ind. 187; *Brackett v. Norton*, 4 Conn. 517; *Moore v. Gwynn*, 5 Ired. 187; *Taylor v. Boardman*, 25 Vt. 581; *Ingraham v. Hart*, 11 Ohio, 255; *Kline v. Baker*, 99 Mass. 254; *Dyer v. Smith*, 12 Conn. 384; *Holmes v. King*, 7 Mete. 384; *Hoadly v. N. T. Company*, 115 Mass. 304; *Donegan v. Wood*, 49 Ala. 242.

The question as to the law of Michigan was properly submitted to the jury in instruction No. 20, given at appellant's request.

At the request of defendant seventeen questions were submitted to the jury for the purpose of having special findings of fact in answer thereto. The jury answered all the questions thus proposed to them, and the answers given are in no wise inconsistent with the general verdict, but it is insisted that several of the questions were evasively and not properly answered. The questions and the answers to them are as follows:

"8. Was it an ordinary occurrence for the rigging or stays of vessels to catch upon the chutes of the ore dock in question?

"A. Yes; but not in the dangerous manner proven in this particular case.

"12. Would the plaintiff have been injured if he had let go of the pole when it was caught between the stay and the chute?

"A. We do not know.

"15. Do you believe that plaintiff handled the pole with which he released the stay in a proper manner?

"A. We can not tell.

"16. Was the removing of the back stay from the chute of the ore dock more dangerous than other duties which they were called upon to perform in the pockets?

"A. Yes, under these circumstances.

"17. Was it customary for the laborers on the ore docks to remove ropes and stays caught upon the chutes of the docks?

“A. Not under such circumstances.”

Upon the coming in of the jury with the general verdict and the answers to questions, including those above set out, defendant moved the court to set aside the general verdict and to enter a verdict in its favor on the special findings on the ground that such special findings were inconsistent with the general verdict. This motion the court properly overruled, for the special findings were not, as we have before said, at all inconsistent with the general verdict. The only criticism to which the special findings were subject was that the jury failed to answer some of the questions put to them. If the defendant desired to have these questions answered or more fully answered, counsel should have moved the court to send the jury back to respond to each question. Such is the practice as laid down by the Supreme Court of this State, under a statute allowing special findings to be made, similar in terms and effect to the law which now authorizes such finding. *St. Louis & S. E. Ry. Co. v. Dorman*, 72 Ill. 504.

This is also the practice which obtains in other States under similar statutes. *K. P. Ry. Co. v. Peavy*, 34 Kansas, 482; *West v. Cavins*, 74 Ind. 265; *Bedford S. O. & B. R. R. Co. v. Raibolt*, 99 Ind. 551.

Waiving all question as to whether the interrogatories were material and proper for the purpose of requiring answers to them, we think that the failure to ask that the jury should be required to answer them fully, and moving on all the answers as given for a verdict in favor of defendant, places appellant in a position where its counsel can not now assign the failure to answer the questions as a ground for new trial. *McElfrest v. Guard*, 32 Ind. 408.

No error has been called to our attention, nor have we discovered any, which authorizes the interference of this court with the verdict, and the judgment of the Superior Court must therefore be affirmed.

Judgment affirmed.

GARY, J., takes no part in the decision of this case.

THE NATIONAL BANK OF ILLINOIS

V.

MARY S. BAKER.

Collateral Security—Power of Sale—"Depreciation"—Fraud—Subrogation—Agency.

1. A power conferred upon a party adverse in interest, or upon a third person who acts at the instance of such party, must be strictly pursued.

2. The fact that collateral securities are not what they purport to be, but are of less value and in part fraudulent, does not justify a sale under a power authorizing a sale upon their depreciation in value.

3. In the case presented, it is *held*: That the power of sale only applied to events then in the future; that the fraud in question did not enlarge the power; that the sale was unauthorized; and that the utmost claim of the purchaser is to be subrogated to the position of the vendor, holding the policy of insurance as security for the payment of the original indebtedness.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

MESSRS. BRADY & NORTHRUP, for appellants.

A power to sell collaterals may be given by the contract of pledge. Such a power is not against public policy, nor is it open to any objections as to its validity.

The terms of the contract of pledge govern the rights of the parties as to the time, place and notice of sale. *Colbrook* on Collateral Securities, Sec. 118; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Loomis v. Stave*, 72 Ill. 623; *Zimpleman v. Veeder*, 98 Ill. 613.

When the power or contract of pledge provides that, in case of default, a sale of the collaterals may be made without notice to the pledgor of pledgee's intention to sell, the pledgee has the right to sell without giving notice, and a sale so made is valid. *Loomis v. Stave*, 72 Ill. 623; *Milliken v. Dehon*, 27 N. Y. 364; *Chouteau v. Allen*, 70 Mo. 290.

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If the pledgee, under a power of sale conferred on him, makes a *bona fide* sale of the collateral to one capable of buying, the sale will pass the title to the collateral beyond the pledgor's reach. *Zimpleman v. Veeder et al.*, 98 Ill. 613; *Stokes v. Frazer*, 92 Ill. 428; *Lewis v. Mott*, 36 N. Y. 395; *Duncomb v. N. Y., etc., R. R. Co.*, 84 N. Y. 190; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Jerome v. McCarter*, 94 U. S. 734; *Newport Bridge Co. v. Douglas*, 12 Bush, 673; *White Mountain R. R. Co. v. Bay State Iron Co.*, 50 N. H. 57.

A *bona fide* sale of collaterals made after default, under a power of sale, vesting the title in a purchaser for value, in good faith, is not affected by a tender of the debt and charges made subsequently thereto. *Colebrooke on Collaterals*, Sec. 122; *Loomis v. Stave*, 75 Ill. 623; *Chouteau v. Allen*, 70 Mo. 290.

The *bona fide* assignment of a policy of life insurance, issued in favor of the wife and assigned by the husband and wife to a creditor of the husband, will enable the assignee to recover. *Kerman v. Howard*, 23 Wis. 108; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; *Baker v. Young*, 47 Mo. 453; *Foster v. Gile*, 50 Wis. 603.

The above doctrine was fully sustained in a case in this State, where only a part of the policy had been assigned. *Pomeroy v. The Manhattan Life Ins. Co.*, 40 Ill. 398.

Policies of insurance are choses in action, and governed by the same principles as other agreements of that character. *Bliss on Life Ins.*, pp. 517, 596, Sec. 325; *Palmer v. Merrill*, 6 Cushing, 282; *St. John v. American Mutual Life Ins. Co.*, 3 Kernan, 31.

Messrs. ABBOTT & BAKER, for appellee.

The attempted sale by Kretsinger to Freeman was not made in good faith, of which fact Freeman had notice, and therefore the sale is void.

The pledgee of personal property is the trustee for the pledgor. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548; *Zimpleman v. Veeder*, 98 Ill. 613.

Transferee taking with notice of the violation of trust takes

it subject to trust. *Fawcett v. Nat. Life Insurance Co.*, 5 Ill. App. 274.

While a power may authorize a sale either at public or private sale, the pledgee nevertheless is bound to use reasonable care and diligence to obtain the best price for the pledge. Like all trustees he must act in good faith.

GARY, J. The facts of this case, so far as it is necessary to state them for decision of it, are that on the 2d of October, 1880, the New England Mutual Life Insurance Company issued a policy of life insurance on the life of William Baker for \$5,000, for the benefit of Mary S. Baker, his wife, the appellee. He died on the 15th day of February, 1886, she surviving.

On the 14th of December, 1885, he and she made a promissory note, payable in ninety days thereafter, to the order of W. H. Kretsinger, for \$600, with a warrant of attorney attached to confess judgment, and a recital that as security for the payment of the note a deposit had been made with Kretsinger of a certificate for 100 shares of the stock of the Journal of Commerce Company of \$100 each, and the policy of insurance before mentioned; and following was this provision:

"And in default of payment of the said note, or any part thereof, at maturity, I do hereby authorize said Kretsinger, or his assigns, to sell and dispose of said security, or any part thereof, at public or private sale, in his or their discretion; and in the event of said security, or any part thereof, depreciating in market value, I do hereby authorize said Kretsinger, or his assigns, at his or their option, to sell and dispose of said security, or any part thereof, at any time before or after the maturity of said note, at either public or private sale, and in the event of sale before or after the maturity of said note, as aforesaid, no notice of such sale shall be required to be given to the undersigned, or to any other person or persons whomsoever, either by advertisement or otherwise; and the proceeds of such sale or sales so made as aforesaid shall, after the payment of all expenses and commissions attending said sale or sales, be applied on said note, and the balance, if any, after payment of said note with interest, shall

be returned to the undersigned, his heirs, executors, administrators or assigns; and at any sale of said collaterals, or any part thereof, made by virtue hereof, it shall be optional with the legal owner or holder of said promissory note to bid off and purchase said collaterals, or any part thereof."

On the 10th and 22d days of December, 1885, William Baker became indebted to the appellants in the sum of \$10,000 for money loaned, under representations grossly fraudulent, made by him to the appellants, and on the 31st of the same month failed in business.

The certificate of shares in the Journal of Commerce Company was a forgery. On the 22d of January, 1886, an attorney of the appellants went on their behalf to Iowa, where Kretsinger was, and Kretsinger sold to the attorney the certificate of shares and the policy for the amount of \$612.10, and delivered to the attorney a bill of sale of them and assigned the note to him. The attorney on the next day made a like transfer for a consideration named of \$785.80 to the appellants. The case turns on the validity of this sale by Kretsinger. It is said in support of it, that when the fact that the certificate of shares was a forgery became known to Kretsinger, he was entitled to act under the power of sale.

It is not shown that the appellee participated in, or in the proceeds of, the fraud practiced upon the appellants by the deceased, or that she had any knowledge of the forgery of the certificate of shares.

The position of the appellants is, that if the securities pledged were not in fact what they purported to be, but were something of less value, that was a depreciation. "Depreciating" as used in the power, is the present participle of the verb depreciate, used intransitively, which verb, as defined by Webster, means "to fall in value; to become of less worth; to sink in estimation." As used in the power it applied only to what might happen in the then future.

What remedy Kretsinger might have had, if he had rescinded the contract on account of the fraud of William Baker, by assumpsit for money had and received, as the note was given for money loaned, or by special action on the case, it is not

necessary now to inquire. If, instead of rescinding, he claimed under the contract, he took it as it was written. He could make no sale except upon the happening of an event specified in the power. The power was not enlarged by the fraud.

It is the same principle as applies where a vendee of goods procures a sale by fraud upon credit. Assumpsit for goods sold and delivered will not lie before the credit expires, for the vendor adopting the contract of sale adopts its terms. 1 Chitty on Cont. 570, and cases therein cited.

So a principal who adopts the unauthorized act of an agent adopts the whole of it. *Morris v. Tillson*, 81 Ill. 607; Story on Agency, Sec. 250, and cases there cited. The cases are very numerous that hold, either by express words, or necessary implication, that a power conferred upon the party adverse in interest, or upon a third person who acts at the instance of such party, must be strictly pursued. The rule has been applied to judgment notes, mortgages and trust deeds with power of sale, and to pledges. *Waterman v. Jones*, 28 Ill. 54; *Waite v. Dennison*, 51 Ill. 319; *Flower v. Elwood*, 66 Ill. 438; *Union T. Co. v. Rigdon*, 93 Ill. 458; *Keith v. Kellogg*, 97 Ill. 147. There are too many cases upon the subject, even in this State, to attempt a reference to all of them.

Holding, then, that the power only applied to events then in the future, that the fraud of the deceased did not enlarge the contract or the remedy upon it, it follows that the sale by Kretsinger was unauthorized, and that the utmost claim the bank has upon the fund which accrued from the policy, is to be subrogated to Kretsinger's position, holding the policy as security for the payment of the \$600 note and interest.

The case came into the Superior Court on a bill of interpleader filed by the insurance company, to which the parties to this appeal were defendants.

The money due on the policy was paid into court and the decree gives to the appellants the amount of the \$600 note and interest, with their costs, and the residue to the appellee. There is no error in the decree and it is affirmed.

Decree affirmed.

Judge GARNETT, having tried this case in the Superior Court, takes no part in the decision.

METROPOLITAN GAS COMPANY OF HYDE PARK
v.
VILLAGE OF HYDE PARK.

Injunction—Municipal Corporation—Gas Company—Right to Lay Gas Pipes—Ordinance—Acceptance—Attempted Repeal.

Upon a bill filed by a gas company to enjoin a municipal corporation from preventing the complainant from laying gas pipes in the defendant's streets, it is *held*: That the threat on the part of the defendant to use force to prevent the laying of pipes by the complainant, is sufficient to justify the interference of the court, if the complainant is otherwise entitled to relief; that the complainant was justified in not applying for a permit to lay its pipes; that the ordinance in question was a valid grant to the complainant of the right to lay its pipes in the defendant's streets and furnish gas to its inhabitants; that said ordinance was accepted and acted upon by the complainant within a reasonable time; that no formal acceptance of the ordinance was necessary, acts done upon its faith, in furtherance of its purpose, by virtue of it and known by the defendant to have been so done, being sufficient to operate as an acceptance; that the acts of the complainant must be regarded, under the evidence, as done in good faith; that the ordinance and its acceptance constituted a valid contract between the parties, which was not affected by the attempted repeal of the ordinance; and that the case is not affected by a former ordinance granting exclusive privileges to another company.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Appeal from a decree of the Circuit Court of Cook County, dismissing appellant's bill for an injunction. The main facts in the case are as follows:

The Metropolitan Gas Company of Hyde Park became incorporated by that name under the general incorporation laws of the State, June 20, 1882, with a capital stock of \$500,000, divided into five thousand shares of \$100 each, the location of its principal offices being Hyde Park, in Cook County. The object for which it was formed was "the man-

ufacture, sale and supply of gas for illuminating, heating and mechanical purposes." Its certificate of incorporation was recorded in the office of the recorder of Cook County, June 23, 1882. The village of Hyde Park is a municipal corporation, being incorporated August 19, 1873, under and by virtue of "An act to provide for the incorporation of cities and villages," in force July 1, 1872.

June 26, 1882, the president and board of trustees of the village of Hyde Park passed an ordinance granting to appellant "exclusive permission and authority irrevocable," to lay its gas mains, pipes, feeders and service-pipes in all the streets, alleys, highways, etc., of the village, except in that part of the village territory south of 95th Street, and West of Stony Island Avenue and Lake Calumet. Section 2 of the ordinance makes it obligatory on the company to restore streets, opened for the purpose of laying pipe, etc., to a condition as good as before the opening thereof, and section 3 provides as follows: "The works of said company, of a capacity to manufacture and deliver at least 300,000 cubic feet of gas per day, shall be commenced within five years from this date, and the price of gas to consumers shall not exceed \$3.50 per 1,000 cubic feet."

August 3, 1882, a written agreement, formally signed by the proper officers, and sealed with the corporate seals of the two corporations, was entered into by and between the village and the gas company, in and by which (after reciting that a necessity existed for a proper supply of gas for illuminating purposes in the village, that the village was not in a financial condition to expend the money necessary for the erection of gas works, and desired to induce the gas company to invest the necessary capital in the construction of works, mains and pipes, and in the manufacture and supply of gas, at a reasonable cost to the village and its inhabitants,) the village, in consideration of said circumstances, and the undertakings and agreements of the gas company, agreed to take and use, for twenty years from date of agreement, such quantity of gas manufactured by the company as should be required to light the streets and public buildings of the city, such supply to commence when the company should be in condition to furnish

Metropolitan Gas Co. v. Village of Hyde Park.

the same, the village to pay \$3 per 1,000 cubic feet for the gas and to erect such lamp posts as it might order, bear the expense of service pipes thereto, and of lighting the lamps and keeping them and the lamp posts in repair, the company to have the exclusive right to use such lamps and posts for lighting, etc.

The company on its part agreed as follows: To construct, maintain and operate in the village, works of sufficient capacity to manufacture the necessary supply of illuminating gas, of standard quality, to meet the requirements of said village, "at a cost not to exceed the terms of the ordinance granting permission to said company to lay gas mains, pipes, etc.," and to credit the village with the sum of fifty cents on each one thousand cubic feet of gas supplied to and paid for by it, the amount so to be credited to be, at the end of each fiscal year of the village, certified to and entered on the books of the village and the company, the village thereupon to be entitled to the same *pro rata* dividends as should be paid on the stock of the company; the village to have the right, at its option, to advance money for the extension of gas mains, any money so advanced to be credited and dividends paid thereon in like manner as above stated; to pay to said village, at the end of said time of twenty years, in case the village should comply with its contract, the amount standing to the credit of the village on account of said credit of fifty cents per thousand cubic feet, and in addition thereto, the then value of such pipes as might be laid by the village under its contract, etc.

In conclusion it was mutually agreed that, in the event the village should refuse to take gas for public use from the company, then the provisions of the agreement for payment to the village by the company should be considered canceled.

August 7, 1882, the president and board of trustees of the village passed another ordinance, granting permission to appellant to lay its gas mains, pipes, etc., in all of the streets, etc., of the village. This ordinance is substantially the same as the ordinance of June 26, 1882, with the following exceptions: It does not purport to grant exclusive authority, as did the former ordinance. It extends to all the village territory,

VOL. 27.] Metropolitan Gas Co. v. Village of Hyde Park.

not excepting any part of the territory as did the former ordinance. It fixed the maximum price of gas supplied to private consumers at three dollars per thousand cubic feet, instead of three and one-half dollars, the maximum price fixed by the former ordinance, but provides that in case payment shall be made for the gas within twelve days next after the expiration of the month in which the gas shall have been used, there shall be a rebate to the consumer of fifty cents per thousand cubic feet. It concludes with the provision that this rebate shall not apply to street lamps and public buildings, the supply therefor to be subject to a special agreement.

Appellant purchased and obtained deeds of conveyance dated respectively November 15, November 25 and December 2, 1882, for the following described premises, situated in the village of Hyde Park, Cook County, Illinois: Lots 1 to 7, both inclusive, in block 2, in Crane & Mead's subdivision of 7 92-100 acres in the N. W. $\frac{1}{4}$ of Sec. 2, T. 38 N., R. 14 E., etc., for the consideration of \$10,800, appellant assuming and agreeing to pay a mortgage to secure \$2,000 on lots 4 and 5. (Abs. 29.) These premises were purchased and held by appellant, as the evidence conclusively shows, solely for the purpose of constructing gas works thereon.

May 1, 1883, Joseph T. Torrence and David C. Bradley, who appear by the evidence to have been stockholders, and the former president and the latter vice-president of the company, made, in their own names, but for the benefit of the company, a contract with T. G. Springer, by which it was agreed substantially as follows: Torrence and Bradley, in consideration of Springer's agreement, sold and assigned to Springer all their interest in the capital stock, property and franchise of the company. Springer on his part agreed to build and equip, ready for use, first-class gas works, for the manufacture of illuminating gas, of a sufficient capacity to produce 400,000 cubic feet of gas per day, on lots 1 to 7, inclusive, in Crane & Mead's subdivision in section 2, town 38 north, range 14 east, etc., in Cook County, Illinois, and to have such works ready to furnish gas within six months from the date of the agreement, and to turn the completed works over to the

Metropolitan Gas Co. v. Village of Hyde Park.

Metropolitan Gas Company of Hyde Park. It was further agreed that, for the purpose of raising money for the construction of the works, Springer should cause the company to issue twenty-year seven per cent. bonds, secured by mortgage or deed of trust on the company's property, the total amount of the principal of said bonds not to exceed \$200,000, and that as soon as the bonds and mortgage were issued and the mortgage filed for record, and, in any event, not later than three months from date of agreement, Springer would assign to Torrence and Bradley one-third of the entire capital stock of the company, without further consideration, etc., and would also, out of the proceeds of said bonds, put in and lay in the village all mains, pipes, etc., to supply the gas required of the company by the village, and that the gas company should make all necessary expenditures for perfecting its franchises and securing contracts for gas, etc.

May 12, 1883, the following communication from appellant was presented to the president and board of trustees of the village, at their meeting held on that day :

“To the President and Board of Trustees of the Village of Hyde Park.

“GENTLEMEN : You are hereby notified that the Metropolitan Gas Company, of the village of Hyde Park, county of Cook and State of Illinois, a corporation duly organized under and by virtue of the laws of Illinois, and whose organization has been fully completed, has commenced business, and that, in view of, and under the provisions of the ordinance passed by the president and board of trustees of the village of Hyde Park, on, to wit, the 7th day of August, A. D. 1882, granting said corporation the right to lay pipes and operate gas works in said village, said corporation has purchased the following real estate in said village on which to erect its works, to wit : Lots 1, 2, 3, 4, 5, 6 and 7, in block 2, in Crane and Mead's subdivision, in section 2, town 38 north, range 14 ; the title to the same being taken and recorded in the name of said Metropolitan Gas Company, on which the said company has paid to the said village the taxes ; and, further, that said company has entered into contracts for the erection of its works and

Vol. 27.] Metropolitan Gas Co. v. Village of Hyde Park.

machinery, and for the laying of sufficient iron pipe to supply the said village, and that, by such contract, it has provided that said works and pipe shall be in a condition to furnish a full supply of gas before the end of next November; that all this has been done under and in view of the said ordinance, and said company are proceeding, in good faith, to the erection of works that shall have a capacity of about 400,000 cubic feet of gas per day. All of which is respectfully submitted.

“JOHN M. BROWN,

“Secretary of the Metropolitan Gas Company.”

The foregoing communication was referred by the president and board of trustees to the judiciary committee of the board, and afterward at the same meeting, and before the judiciary committee had made any report, the following occurred: “Mr. Mason moves a reconsideration of the vote referring the communication from the Metropolitan Gas Company to the judiciary committee, with directions to confer with the officers of said company,” etc. “The motion was carried,” etc. Afterward, and at the same meeting, the following ordinance was passed, approved and filed:

“Be it ordained by the president and board of trustees of the village of Hyde Park:

“That the ordinance passed and approved June 26, 1882, entitled, ‘An ordinance concerning the Metropolitan Gas Company, of Hyde Park,’ and the ordinance passed and approved August 7, 1882, entitled, ‘Ordinance for the Metropolitan Gas Company of Hyde Park,’ be, and the same are hereby repealed.”

The contract made by Torrence and Bradley with Springer was not carried out. The company, early in the spring of 1884, had plans and specifications for its gas works prepared, and let the contract for its work to one Courtney, who immediately commenced the work and had made a large excavation, about 120 feet wide by 18 feet deep, for the gas holder; had excavated for the foundation, built nearly all the foundation walls up above the surface of the ground ready to receive the brick work; had made a sub-contract for the brick, and had delivered on the ground 116,000 brick; had purchased lumber,

Metropolitan Gas Co. v. Village of Hyde Park.

and had the frames made and the cut stone work and everything pertaining to the finishing of the building, when he was stopped by the company, on account of certain condemnation proceedings in relation to the premises, commenced by the village. The amount expended by the company in fencing the premises and in payments to Courtney on his contract was over \$5,000, in addition to which it bought \$10,000 worth of pipes for gas mains to be used in the village in connection with its works, and had it delivered on the ground. The foregoing was all done prior to June 11, 1884, when the president and board of trustees passed an ordinance for the opening or extension of Walcott avenue, in the village, which would necessitate, if carried out, the taking of about thirty feet from the ends of the lots 1 to 7, inclusive, leaving them 110 feet in depth instead of 140 feet, their original depth, and insufficient for the erection thereon of works of the capacity required by the ordinance of August 7, 1882. The Metropolitan Gas Company of Hyde Park was made a defendant, by name, to the condemnation petition filed June 23, 1884, in the County Court, in accordance with the ordinance of June 21, 1884, and was served with process and appeared, and compensation to the amount of \$14,300, including damages of the remainder of the lots and to improvements, were awarded to it by the verdict of a jury and the judgment of the court. An appeal was prayed by the village and allowed, which was, at the September term, 1888, of the Supreme Court, dismissed on a short record for want of prosecution, and nothing further has been done by the village in regard to the extension of Walcott avenue.

November 25, 1883, appellant presented to the president and board of trustees of the village, at their meeting held on that day, the following communication:

“To the President and Board of Trustees of the Village of Hyde Park.”

“Your honorable body is hereby respectfully informed that it has been advised by competent counsel that the ordinance passed by your honorable body May 12, 1883, and purporting to repeal a former ordinance passed August 7, 1882, was and

VOL. 27.] Metropolitan Gas Co. v. Village of Hyde Park.

is invalid, and that the Metropolitan Gas Company of Hyde Park will immediately proceed to lay gas mains and pipes in Myrtle and Lake Avenues, and other streets in the village of Hyde Park, under and in pursuance of the authority and permission granted by said ordinance passed, as aforesaid, August 7, 1882."

"T. G. SPRINGER,
"President of the Metropolitan Gas Company of Hyde Park."

This communication was referred to the judiciary committee, which committee, at the same meeting, reported, recommending that the captain of police be instructed not to allow any persons to lay pipes in the streets of the village, without first obtaining permission from the board, which report was unanimously adopted. It is admitted in the answer that the board of trustees ordered the captain of police to prevent appellant, or any one acting under it, from laying pipes in any of the streets, and the captain of police testified that he so instructed his men.

The village of Hyde Park had by ordinance passed June 21, 1871, granted to the Hyde Park Gas Company the exclusive right north of 60th street to lay its gas mains, pipes and feeders, and in May, 1883, said Hyde Park Gas Company was located and in operation and furnishing gas to Hyde Park, and had works of sufficient capacity to furnish all required. The ordinance of the village relative to permits to lay pipe is as follows:

"SEC. 1. Any company putting in pipes shall be required to lay their street mains at a distance of not less than ten feet from the center of the street in said village, and on the south or west, or southerly or westerly sides of streets; and in all cases so that they will not interfere with sewers or water pipes, and according to any resolution of the board of trustees. In case water pipes or sewers are laid in any street, so that a compliance with the above will cause gas pipes to be placed on the same side of the street or avenue as the water pipes or sewers, then, in such case, the gas companies shall obtain special permission as to the location of said gas pipes."

Metropolitan Gas Co. v. Village of Hyde Park.

Mr. FRANCIS ADAMS, for appellant.

The ordinance, its acceptance by the company and the acts of the company under and in pursuance of it, constituted a contract between the village and the company which the village was powerless to repeal. *Dillon on Mun. Corp.*, Secs. 314, 450; *City of New Orleans v. Wardens, etc.*, 11 La. Ann. 244; *City of Chicago v. Sheldon*, 9 Wall. 53; *City of Quincy v. Bull et al.*, 106 Ill. 337.

Appellee, having attempted to repeal the granting ordinance and passed an ordinance requiring the taking of part of appellant's lots, which it well knew were purchased solely for the erection thereon of gas works, with part of the improvements made by appellant, having unnecessarily delayed and protracted the condemnation proceedings, leaving appellant, during such delay, uncertain as to whether it would proceed and make the improvements or exercise its right of abandonment, and having ordered its police to forcibly prevent appellant from proceeding to lay mains and pipes, is estopped from asserting that appellant has unreasonably delayed constructing its works. *City of Chicago v. C. & W. Ind. Ry. Co.*, 105 Ill. 73.

The answer set up contains ordinances of the village, passed respectively in 1871 and 1875, purporting to grant to the Hyde Park Gas Company permission to lay mains, pipes, etc., in the streets of the village, and contains allegations as to what that company did in the premises, and appellee's counsel introduced the ordinances in evidence. Clause 2d of section 1 of the ordinance of June 21, 1871, purports to grant to the company exclusive rights within certain described territory. The authorities are clear that a municipal corporation can not grant such exclusive right, unless expressly authorized so to do by legislative enactment. *Dillon on Mun. Corp.* 692, 693, 695, 696; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Chicago v. Rumpff*, 45 Ill. 90.

Appellant is not seeking to contest the right of any other corporation, and the sole question in this case is, whether appellant acquired vested rights under the ordinances of 1882, which the village of Hyde Park could not divest against ap.

VOL. 27.] Metropolitan Gas Co. v. Village of Hyde Park.

pellant's will by the repeal of the ordinance or otherwise. Such being the question, and it not being insisted that the Hyde Park Gas Company has any exclusive rights under the ordinances in respect to it, I am unable to perceive that these ordinances are relevant to the issue.

Messrs. SMITH & PENCE, for appellee.

The gas company, assuming that the ordinances of June 26 and August 7, 1882, are in force, is not entitled to relief. Its works are not in readiness, and it can not furnish gas. The court will not assume that it will build and complete its plant. The proofs are that it abandoned in 1884 the thought of construction upon the lands purchased, and it has none other. The circumstances show that it is a speculative organization.

Equity will not assist a speculation, nor cause a needless thing to be done. *Healy v. J. & C. R. R. Co.*, 94 Ill. 416.

The gas company has not shown a disposition or willingness to comply with the general ordinances. These ordinances are reasonable and not inconsistent with those of June and August, 1882. They are in force. *City v. Bull*, 106 Ill. 331.

The gas company should have asked a permit. In fact the prohibitory order in terms goes only to the extent of requiring a permit.

If the permit had been asked the village might have given it, and in doing so would have exercised its reserved right to designate location.

The letter presented on November 25, 1885, was a threat, not a request.

The refusal of the village was, under the circumstances, the exercise of a discretion with which courts will not interfere. *Chicago v. Wright*, 69 Ill. 318; *Thornton v. Roll*, 118 Ill. 350.

The ordinance of June 26, 1882, was void. It purports to be exclusive. The village, without power conferred by law, attempted to exercise an authority belonging to the legislature. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683. It allowed an unreasonable time within which to commence work. In other words, it undertook to bind the village for five years, without a corresponding obligation on the part of the gas company. *Garrison v. City*, 7 Bissell, 480.

Metropolitan Gas Co. v. Village of Hyde Park.

The same may also be said of the ordinance of August 7, 1882. *Cornell v. People*, 197 Ill. 372.

The ordinance of June 26, 1882, was not accepted, and was inconsistent with that of August 7, 1882.

The contract of August 3, 1882, was *ultra vires* and void. It was also inconsistent with the preceding ordinance. It was not an acceptance in intent, nor in fact; nor was it made in good faith. It appears upon its face to have been corrupt.

The ordinance of August 7, 1882, was a revocation of that of June 26th, because they are not reconcilable.

The ordinance of August 7, 1882, was not accepted, nor was any work done until May 12, 1883, the day of the repeal.

Lands were purchased in November, 1882, but nothing was done upon them until May 12, 1883. They could have been sold at any time. The ordinance was not, as regarded the village, acted upon prior to the repeal. *C. C. R. W. Co. v. People*, 73 Ill. 341; *M. C. R. W. Co. v. C. W. D. R. W. Co.*, 87 Ill. 317; *City v. Bull*, 106 Ill. 331.

The contract between Bradley, Torrence and Springer, to which the gas company was not a party and by which it was not bound, was, as regards the relations between the village and gas company, of no moment. The repeal was, therefore, a revocation which was within the power of the village.

MORAN, J. Appellee takes the position in its answer that appellant had no authority whatever to lay gas pipes or mains in the streets of the village, and admits that, after the receipt by the authorities of the communication from appellant that it would immediately proceed to lay gas mains and pipes in Myrtle and Lake avenues and other streets, the president and board of trustees ordered the captain of police to prevent appellant, or any person acting for it, to lay gas pipes or mains in any part of the streets. That being the position of the village authorities, it was wholly unnecessary for the gas company to make an actual attempt to lay pipe in some street before applying to the court to restrain the officers from forcibly preventing the operations of the company.

The threat to use force will justify the interference of the

court if the complainant is otherwise entitled to the relief, and particularly is this so when, in the answer, the legal right of the complainant is denied and the intention to use force to prevent the accomplishment of the act is admitted.

The suggestion by counsel for appellee that complainant should have applied for a permit is not tenable, for the reason that the answer and proof shows that no permit would be granted, as the village authorities denied complainant's legal right, and for the further reason that the conditions are not shown to have been in existence, which made it necessary for the company to have a special permit under the ordinance of the village.

The propriety of the action of the court below in refusing the relief sought by the bill depends on the question whether there was a valid ordinance which had been passed by the village and accepted by appellant, and which thus became a binding contract between appellee and appellant before the repealing ordinance of May 12, 1883, was passed by the village board.

We are disposed, in the determination of this question, to confine ourselves to the consideration of the ordinance of August 7, 1882. The only objection to the validity of this ordinance is that it gave complainants the period of five years in which to commence the erection of gas works. If the provisions of the ordinance relating to the time within which the operations of the company were to be commenced were treated as invalid, the remaining provisions of the ordinance would stand as they are, not connected with or dependent upon the time clause. The company would be forced to accept the ordinance and act under it within a reasonable time. The ordinance then as passed must be held to have been a valid grant to the company to lay gas pipes and mains in the streets of the village and to furnish gas to the inhabitants, and the remaining question is whether said ordinance was accepted and acted upon by the appellant within a reasonable time.

It appears from the record that within four months from the passage of the ordinance appellant, through its officers, procured a person who had experience in the construction and operation of gas works, to examine certain real estate in the

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Metropolitan Gas Co. v. Village of Hyde Park.

village, in order to determine its suitability as a location for such gas works as appellant was required to erect; and that upon said expert reporting favorably as to said real estate, the same was purchased by appellant for the sum of \$10,800, and the title to the same vested in appellants by a sufficient deed.

On May 1, 1883, and within nine months after the passage of said ordinance, Bradley and Torrence, who were promoters, stockholders and officers of the appellant company, made in their own names, with Springer, a contract for the erection and equipment of gas works upon the land so purchased and held by appellant; said works to be ready to furnish gas within six months from the date of said contract, and the works, when so completed, to be turned over to the appellant. As consideration to Springer, Bradley and Torrence assigned to him all their interests in the capital stock of the appellant company, and in and to its property and franchises, and authorized him to issue bonds of the company secured by trust deed upon its property, and, after said bonds were issued, Springer was to re-assign to said Bradley and Torrence one-third of the capital stock of the said company.

On May 12th the village was notified of the purchase of said land by appellant, and of the making of said contract, and that such acts had been done under and in view of said ordinance.

Did those acts, done, as we are bound to believe from the evidence they were done, in good faith, constitute a sufficient acceptance by the appellant of said ordinance, so as to bind the company and create an obligation to erect gas works and furnish the inhabitants of the village with gas?

There does not appear to have been any formal acceptance of the ordinance at the meeting of the board of directors of the company, but while such an acceptance would probably be sufficient, yet that the ordinance was so accepted need not be shown, as acts done upon the faith of the ordinance, which are in furtherance of its purposes and induced by it, and which are known to the village or city granting the ordinance to have been done in pursuance and by virtue of the ordinance, will amount to a binding acceptance without any formal ac-

VOL. 27.] Metropolitan Gas Co. v. Village of Hyde Park.

ceptance by the managing board of the company. Acts which will constitute such acceptance must not be such as are merely equivocal in character, but there must be such acts as, given their fair import and interpretation, can be said to be done in furtherance of the purpose of the act.

Thus, it was held by the Supreme Court of Indiana, it was evidence of the acceptance of a railroad charter passed by the legislature in January, 1849, that in October, 1851, a meeting was held by a majority of the corporators named, when they determined to build the contemplated railroad under the charter. *State v. Dawson*, 22 Ind. 272.

We are of opinion that the purchase by appellant of land on which to erect its works after the passage of the ordinance, and the contract made for the benefit of appellant by persons who had invested a considerable sum for the promotion of the enterprise and who were stockholders of appellant, for the erection of gas houses and apparatus for appellant, were acts of an unequivocal character, done in pursuance of the object and purpose of the ordinance, and that when appellee had notice of those acts and the intent and purpose for which they were done, it became too late for appellee to repeal the ordinance, and that the same was and continues to be a valid and binding contract between the appellant and the village of Hyde Park.

The suggestion by counsel for appellee that the land which appellant purchased could be sold again, and therefore the purchase of it was not acting upon the ordinance as regarded the village, might be said of any act which the company could perform short of the actual laying of its pipe in the streets. A building erected by the company could, after its erection, be put to other uses than the manufacture of gas, and excavations made in the streets for pipe might be filled up again and no pipe be placed therein. The land might be purchased and the building erected and the pipe laid as a sham and a pretense, it is true; but, if such acts were done in good faith, it is difficult to perceive why they would not be sufficient acceptance of such an ordinance as this when brought to the notice of the village.

Umlauf v. Umlauf.

Such acts should be regarded as done in good faith under the ordinance when the officers of the company so swear and there is no evidence to indicate the contrary.

The ordinance having been accepted before the repeal of May 12, 1883, constituted a binding contract between appellant and the village, and the village was therefore powerless to set it aside, and the attempted repeal was futile and without legal operation. *City of Quincy v. Ball et al.*, 106 Ill. 337; *City of Burlington v. Burlington Street Ry. Co.*, 49 Ia. 144; *Railway Co. v. Village of Carthage*, 36 Ohio St. 631.

The fact that the village had, by ordinance, granted exclusive privileges to the Hyde Park Gas Company, and that said company have works in operation and can supply the wants of the village, can have no influence on the result of this case. The interests of the village, or the inhabitants thereof, are not likely to be injured by permitting two gas companies to distribute gas instead of one, and it is even possible that some advantage may come to the users of gas by allowing the competition.

We are of the opinion that the court erred in refusing the injunction prayed for, and the decree must be reversed and the cause remanded, with direction to allow the injunction in accordance with the prayer of the bill.

Reversed and remanded.

LEWIS UMLAUF
v.
VICTORIA UMLAUF.

Divorce—Custody of Children—Petition to Change—Scope of Inquiry.

1. Where a decree of divorce provided that the children should remain under the care, custody and tuition of the mother, until the further order of the court, and such decree has not been brought to this court for review, upon a petition by the father to have the custody of the children changed, the inquiry is limited to matters set up in the petition, arising since the entry of the decree.

2. Upon the entry of a decree of divorce, the court will chiefly regard the good of the children in making provision for their custody.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. WM. T. AMENT and C. C. STRAWN, for appellant.

Messrs. BLANKE & CHYTRAUS and JOHN WOODBRIDGE, for appellee.

GARY, J. On the 22d day of April, 1887, in the Superior Court, the appellant obtained a decree for divorce from the appellee on the ground of desertion, and in that decree the court ordered that the two sons of the parties, then aged nine years and six years and six months, respectively, should remain under the care, custody and tuition of the defendant (appellee) until the further order of the court.

The court found and recited in the decree, that both parties were fit to have the custody, care and tuition of the children, but that "on account of the tender ages and present physical condition of said children, it is for their better welfare that they remain" with her. The decree also required him to pay her forty dollars per month for their support. That decree remains in force; neither party appealed from it. It is now to be taken as a wise exercise of the judicial discretion of that court.

On the 13th of October in the same year, the appellant presented to that court his petition, asking that the custody of the children might be "restored" to him. The only matters of fact which he alleges as the ground of his petition, and which by any construction can be considered as relating to what has happened since the decree, are stated in his petition as follows:

"This petitioner further states to the court that the slight indisposition of said children, alleged to have existed at the time of the entry of the aforesaid decree, has long since passed away; that he can properly support and maintain them under his own roof for about one half the sum of money which the

said decree required him to pay for their maintenance elsewhere, and that he can not afford the said unnecessary expenditure." The petition then proceeds: "Petitioner further says that he ought to be invested with the care, custody and control of his said son Arthur, who is now about nine years and six months of age, and of the brother of said Arthur, who is now about seven years of age, for the reasons following:

"1. Because it is for the unquestioned best moral and physical welfare of the said children.

"2. Because he can maintain the said children on less expense at his own home.

"3. Because your petitioner has never waived, lost or forfeited his right to the custody of the said children.

"4. Because your petitioner has never committed any act or deed for which the law of the land will compel him to maintain two separate homes, or to enforce a separation of his children, or that any of them should, during their minority, be taken and kept away from him, and to be raised as in hostility and as strangers to him.

"5. Because the law of the land does not reward the guilty and punish the innocent.

"Wherefore, for the reasons aforesaid, and for others not above stated, your petitioner respectfully asks that justice may be done to him and to his children, and that the said children, Arthur and Oscar, may be restored to the custody of petitioner."

On the hearing of the petition the only evidence introduced as to what in this opinion are called "matters of fact," related to the physical health of the children, and the cost of the petitioner of maintaining the children at his own house, being less than he was required to pay to the appellee. As to the amount he is, by the decree, required to pay, it appears by the record that the court was inclined to reduce it, but the appellant did not, in his petition or at the hearing, ask for a reduction, and he can not assign as error that the court failed to do what was not asked.

Without reciting the evidence it is sufficient to say that it does not appear that the condition of the children had changed

since the decree, except that they were a few months older. The effort of the appellant, on the hearing of the petition and on this appeal, is, in effect, to review the decree of divorce so far as it relates to the custody of the children. That can not be done on this appeal.

That this court should review that decree, it must be brought here by appeal or writ of error. All reasons addressed to this court, on this appeal, why the court ought to have changed the custody of the children, must be based upon what has happened since the decree, and not upon the character or condition of the parties, or of the children, at the time the decree was made.

The relative cost to the petitioner of the two modes of supporting the children is not a new ground. It exists, and at the time of the decree existed, in the nature of things.

The custody of children in cases of divorce is a subject as delicate as any with which courts have to deal. The good of the child is the chief thing to be regarded. 2 Bishop M. & D. Sec. 529; Hewitt v. Long, 76 Ill. 399.

In Wilkinson v. Deming, 80 Ill. 342, it is held that where a decree of divorce gives to the complainant absolutely the custody of a child, it takes from the defendant all power thereafter over the infant until it shall be restored by the action of a proper court. Whether the custody shall be given to the complainant or defendant, is to be determined by the court when it enters the decree for divorce. A decree, if wrong, is just as invulnerable to collateral attacks as a right one. This court does not intimate that the decree between these parties was not right. The court that has before it the parties and the children has the same superior facilities for judging as to the proper custody that a jury, or a court trying a cause without a jury, has for passing upon the credibility of the witnesses. The whole case is not here for a trial *de novo*.

Great stress is laid by the appellant upon the assumed facts that the appellee treats the children with cruelty, is raising them in hostility to the appellant, and permits them to associate with one person named, with whom no association by them ought to be allowed. In this petition no such ground for

changing the custody was alleged. If, however, the rule that the allegations and the evidence must correspond to each other were relaxed, the case only shows that the appellant and his witness testify that the oldest one of the children, in interviews with them, said that this improper associate came and stayed frequently over night, and played with him; that, at the time of one of the interviews, this boy had a bruise on his head, and said his mother whipped him often; and they described the conduct of appellee and the children, especially the youngest, indicating that the children were taught to regard the appellant with aversion.

The children, who were on the stand as witnesses, deny the whole matter, as does the appellee, and to some extent she is corroborated in several particulars by other witnesses. It appears that the boys have two uncles of the same first name. The appellant insists that the boys are permitted to associate with the bad one, while the appellee contends that it is the other. What was the extent of the intercourse, and with whom, was for the Superior Court, upon the conflicting testimony, to decide.

And as to the sentiments of the children toward the appellant, and the influence exerted to produce them, the treatment of the children by the appellee, and the many considerations by which what would be for the welfare of the children is to be determined, the presence of the parties and the children in the court was an aid which a court of review can not have.

The only inquiry is whether the court erred in not changing the custody because of a changed condition of the parties or the children, or improper conduct by the appellee since the decree, and there being no such error the decree dismissing the petition is affirmed.

Decree affirmed.

SOUTH PARK COMMISSIONERS

V.

CHARLES B. PHILLIPS ET AL.

Interrening Petition to Enforce Equitable Lien on Fund in a Court of Equity—Jurisdiction—Jury—Discretion—Findings of Fact—Practice—Attorney's Fees—Lien.

1. A court of equity having custody of a fund is the proper forum in which to assert an equitable lien thereon. Where an intervening petition is filed for that purpose, and the defendant answers, he thereby submits the issue to the court and is bound by its action. Whether the issue shall thereafter be submitted to a jury is wholly within the discretion of the chancellor.

2. In the case presented it is *held*: That the master's report contains findings of fact which fully support the decree; that the confirmation of the report by the decree was, in legal effect, the adoption of such findings as the basis of the decree; that the defendant should have preserved the evidence in the record, if he desired to have this court review the findings of fact upon which the decree is based; and that the question of lien for attorney's fees is not involved, as the lien sought to be asserted grew out of an express contract and assignment of a portion of the fund.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. JOHN GIBBONS, for Charles B. Phillips.

Mr. H. S. MONROE and W. J. TEWKESBURY, for petitioners.

MORAN, J. On November 2, 1885, Monroe and Tewkesbury, attorneys at law, filed an intervening petition in the above entitled cause against said Charles B. Phillips, alleging, in substance, that petitioners had rendered to Phillips certain legal services in trying and arguing the cause of said Phillips against South Park Commissioners, which services were rendered in pursuance of two certain agreements of said Phillips, which were in the words following:

27	380
50	339
27	380
66	495
27	380
166	486
27	380
88	229

South Park Commissioners v. Phillips.

"For and in consideration of the legal services of Henry S. Monroe in appearing, trying and arguing the case now pending before Judge Tuley, or in appearing and trying said cause in the United States Court in and for the Northern District of Illinois, in case said cause is transferred to that court, so far only as the validity of certain pretended contracts between Charles B. Phillips and the South Park Commissioners, or between said C. B. Phillips and Corydon Beckwith are concerned (it being understood that the only service to be required of said Monroe is to defend said Phillips against said pretended contracts to the best of his ability), I, the said C. B. Phillips, hereby agree, out of whatever I may receive from said park commissioners, or through an order and decree of any court, distributing the fund, I shall receive for the land appropriated for park purposes, to pay to said Monroe for such service the sum of \$2,000, and this contract shall be regarded as an order and voucher for said above mentioned service. It being understood that said sum shall be paid only out of said fund. The further sum of \$500 is to be allowed for the transfer of this cause to the United States court.

(Signed) "C. BURTON PHILLIPS."

"In consideration of the past services of Monroe and Tewkesbury in my suits, and in consideration of their procuring a bondsman to appeal the case lately decided by Hon. M. F. Tuley to the Supreme Court, and of their preparing and arguing said cause and rendering such service in my other cases as I may desire them to perform, I hereby assign, transfer and set over to said Monroe and Tewkesbury sufficient of the moneys to become due from the South Park Commissioners to me for my interest in the land mentioned in the decree of said M. F. Tuley aforesaid, to indemnify fully any one signing my said bond, and also to pay said Monroe and Tewkesbury for the services rendered and to be rendered by them and all their advances and expenses in my case over and above the sum of two thousand dollars, for which I have given them an assignment as stated therein. In case of any disagreement between myself and said Monroe and Tewkesbury as to the value of their services, the judge of the court

who shall have charge of the case and the distribution of the moneys to be paid by the South Park Commissioners, shall decide upon the amount due said Monroe and Tewkesbury, and said Monroe and Tewkesbury shall have the right to draw said amount and their receipt therefor shall be a full acquittance for the same.

“Chicago, March 4, 1885.

(Signed) “C. B. PHILLIPS.”

An itemized bill of services rendered is set out in the petition and it is alleged that there was a decree rendered in said case of South Park Commissioners v. Phillips whereby said Phillips was to receive a large sum of money, which money was paid into court; that said Phillips has prayed an appeal in said cause, and declines to pay the amount due to petitioners, and petitioners claim a lien on the fund decreed to be paid to said Phillips, and have given notice of such claim to the South Park Commissioners. Prays for a rule on Phillips to answer, and that petitioners be awarded the amount of their claim, and said Phillips be decreed to pay the sum out of said fund, etc.

Phillips did not demur to this petition, but answered the same, denying that petitioners were entitled to recover anything for their alleged services, but admitting the making of the contracts above set out. A replication was filed to the answer, and on May 21, 1887, on notice to Phillips, the court ordered the matter of said petition to be referred to a master to take proof of the material allegations in said petition contained, and report the same with the findings thereon to the court.

On May 25, 1887, Phillips filed a motion in writing for a trial by jury upon the issues of fact made by the petition, and to set aside the reference to the master, which motion the court denied.

On November 7, 1887, the master filed his report, finding the amount due the petitioners to be \$5,317. Exceptions to said report were filed and were heard by the court, and were sustained as to certain items, so as to reduce the amount allowed to petitioners to \$4,317, for which a decree was

South Park Commissioners v. Phillips.

entered in favor of petitioners, and that amount directed to be paid out of the fund in court in said cause of South Park Commissioners v. Phillips.

From this decree an appeal is prosecuted by Phillips to this court.

Counsel for appellee makes as his first point against the decree that the court of chancery had no jurisdiction to try the question, and that even if the court had jurisdiction it had no right to deprive appellant of trial by jury on the issues involved.

The objection to the jurisdiction of the court comes too late. The case belongs to a class of cases involving contracts and the like, which, while they do not come within the ordinary jurisdiction of a court of equity, yet, inasmuch as these matters only want some equitable element to bring the case within such jurisdiction, the defendant, by answering to the merits instead of demurring, submits the cause to the court, and will not be permitted to afterward raise the question of jurisdiction for the first time on the hearing, much less on appeal. *Richards et al. v. L. S. & M. S. Ry. Co.*, 124 Ill. 519; Same case, 25 Ill. App. 344.

A court of equity having custody of a fund is the proper forum in which to assert an equitable lien upon the same, and while it is true that the amount due petitioners for services was an issue properly triable in a court of law, yet appellant by his answer submitted that issue to the court in equity, and the court acted thereon and he is bound. 1 Dan. Ch. Pr. 608-610. Having submitted his case to the court of chancery he was bound to proceed with the trial thereof in compliance with the practice of that court. The regular mode of settling issues of fact in chancery is by reference to the master, and, while it is in the power of the court to submit issues of fact to the jury, still the granting or refusing a motion to refer an issue to a jury is a matter wholly within the discretion of the chancellor, and his action on the matter will not be reviewed. *Dowden v. Wilson*, 71 Ill. 485; *Russel v. Paine*, 45 Ill. 350; *Milk v. Moore*, 39 Ill. 584; *Flaherty v. McCormick*, 113 Ill. 538.

The master's report is on file and is a part of the record, but there is no certificate of evidence, and we are unable to say what evidence was heard by the master or by the court, except as certain testimony is recited in the report of the master.

There were certain exceptions filed to the report by appellant, the third of which was sustained by the court, and the report in all other respects confirmed by the court. The master's report contains findings of fact which fully support the decree, and the confirmation of the report by the decree is a confirmation of such findings of fact, and in legal effect an adoption of such findings as the basis of the relief granted by the decree.

If appellant desired to have this court review the findings of fact upon which the decree is based, he should have brought the testimony to this court in the proper manner, so that we might inquire from it whether the facts were erroneously found.

In the absence of such evidence we are obliged to conclude that it warranted the findings made by the master and confirmed by the decree. *Groenendyke v. Coffeen*, 109 Ill. 325.

Counsel has cited a number of authorities on the question of lien for attorneys' and solicitors' fees. No such question is involved in this case. Here the lien sought to be asserted grew out of an express contract and assignment of a portion of the fund.

The decree of the Circuit Court must be affirmed.

Decree affirmed.

27	384
43	445
44	21
27	384
46	498

ORSON H. BROOKE

v.

BRIDGET O'BOYLE.

Trespass—Peaceable Entry—Fence in Street—Instructions.

1. If a fence is in a street, any person may remove it without being guilty of trespass.

Brooke v. O'Boyle.

2. Where the owner of land, having the right to immediate possession, makes entry thereon in a quiet and peaceable manner, or without actual force or violence, he is not liable in trespass to one who has neither the right of property nor to the possession.

[Opinion filed December 7, 1888.]

APPEAL from Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. HUTCHINSON & LUFF, for appellant.

No counsel appeared for appellee.

GARY, J. This was an appeal from a justice of the peace, and the cause of action which, by the evidence, the plaintiff claimed to have, was for a trespass committed in tearing down a fence.

There was conflicting evidence as to possession by the plaintiff and as to title in the plaintiff, or in Drexel, for whom the appellant acted. Also as to whether the fence was in a public street.

For the appellee the court instructed the jury as follows:

"5. The court further instructs the jury that in order to maintain an action for trespass it is only necessary for the plaintiff to prove that she was in the actual peaceful possession of the property upon which the trespass is alleged to have been committed, and that the defendants, or some one or more of them, unlawfully interfered with such possession.

"6. The court instructs the jury that although possession of land may be acquired wrongfully by the plaintiff, this will not justify even the owner of property in entering and taking possession forcibly against the will of the person in possession."

There was no evidence of any breach of the peace, if that would make any difference in trespass *quare clausum fregit*. The appellee was not present when the fence was torn down. One of the witnesses, who does not appear to have any relation with her, said he saw it being done and told the men that

Vol. 27.]

Chicago City Ry. Co. v. Gillam.

the fence belonged to appellee, and ordered them to stop, which they did.

The first instruction is wrong in taking from the jury the question whether the fence was in the street. If it was, anybody might tear it down. *Marcy v. Taylor*, 19 Ill. 634. The word "unlawfully" in the last line does not help it. Questions of law are not to be left to the jury. *Bailey v. Godfrey*, 54 Ill. 507; *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455.

And if appellant acted under one claiming title, and if there was any evidence tending to prove that title, then both instructions were wrong. The heresy introduced into the law of this State in 1886, based upon *Dustan v. Cowdry*, 23 Vt. 635, has, after much pruning, been got rid of in *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. The owner may take from a wrongful holder his own, if he can do so without a breach of the peace. If a breach of the peace is committed, then, in trespass *vi et armis*, it may be determined who was in the wrong as to that. Sec. 2, Chit. Pl. 696 *et seq.* (16th Am. from the 7th Eng. Ed.)

The remedy by forcible entry is not touched by this return to the common law in trespass.

For these errors in the instructions the judgment is reversed.

Reversed and remanded.

THE CHICAGO CITY RAILWAY COMPANY

v.

MARY GILLAM, ADM'X, ETC.

Personal Injuries—Next of Kin—Damages for Widow's Sorrow.

In action by a widow to recover damages from a street railway company for causing the death of her husband, it is *held*: That, to sustain the verdict for the plaintiff, the record should show who were the next of kin, and whether the death of deceased was a financial loss to any of his family; and that an instruction touching the allowance of damages for the plaintiff's sorrow was erroneous.

Davies v. Phillips.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. C. M. HARDY, for appellant.

Messrs. MUNN & WHEELER, for appellee.

Per Curiam. This is an appeal from a judgment for \$4,000 damages awarded to appellee by a jury, as compensation to the widow and next of kin of Gabriel Steiger, for the negligence of appellant in causing the death of said Steiger. The record presents no case for recovery, much less a recovery of \$4,000. There is no proof as to who were the next of kin of deceased, nor whether his death was a financial loss to any of his family or relatives who may have survived him.

It is practically admitted by appellee's counsel that the evidence in the case must be supplemented by the averments of the declaration to make out a case. The second instruction for the plaintiff contained an implication that damages might be allowed for the widow's sorrow. That is contrary to the well known and familiar rule settled by repeated adjudications of the Supreme Court of this State.

The judgment will have to be reversed and the cause remanded.

Reversed and remanded.

RACHEL DAVIES

v.

IVA I. PHILLIPS.

Practice—Trial by the Court—Presumption—Conflict of Evidence.

1. Where a case is tried without a jury, and no propositions of law are submitted to be held by the court, it will be presumed that all questions of law were correctly decided.

2. In such a case, if the evidence is conflicting, and the finding of the court below is not manifestly against its weight, such finding is conclusive upon this court.

27	387
78	677
27	387
87	593
87	594

27	387
103	1809
27	387
106	1480
106	1606
109	1168

27	387
115	1603

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. GEORGE W. CASS, for appellant.

Messrs. C. E. CRUIKSHANK and FRED. H. ATWOOD, for appellee.

Per Curiam. This case was submitted to the court for trial without a jury, and the finding of the court was against appellant and in favor of appellee.

No propositions of law were submitted to the court to be held by either party, and it must therefore be assumed that the court decided all questions of law which arose in the case, correctly.

The assignment of error is that the finding of the court is contrary to the law and the evidence. If the court was correct in finding the issue of fact in favor of plaintiff, then the law entitled him to a judgment. So that the question here is, does the record contain evidence which supports the finding of the court. The question arises just as it would upon a verdict in favor of the plaintiff where the jury had been fully and correctly instructed by the court.

We have examined the evidence in the record with care, and while it is certainly conflicting on material points, we are unable to say that there is not evidence to sustain the finding of the court; while, if the finding of the court had been the other way, we should not have felt authorized to interfere with it on appeal, we find no such preponderance against the finding as it stands, as would warrant our setting it aside. Where there is a conflict of evidence and no error of law intervenes, it necessarily follows that the finding of the trial court must be treated as binding on the parties, unless it appears, from an inspection of the entire record, that such finding is clearly and manifestly against the weight of the evidence.

Brown v. Tuttle.

So where the evidence would warrant conflicting inferences to be drawn from facts proved, as might be contended in this case, the inference drawn by the trial judge must be held conclusive on the parties, and binding on a reviewing court.

No such conditions appear on our inspection of this record as warrants interference by us with the judgment rendered by the Circuit Court, and the same must therefore be affirmed.

Judgment affirmed.

WILLIAM L. BROWN

v.

HORACE A. TUTTLE ET AL.

27	389
43	361
27	389
57	287
27	389
75	347

Practice—Default as to One of Two Defendants—Discontinuance as to the Other—Material Amendment—Right of Remaining Defendant to Plead.

1. Where two or more are sued jointly *ex contractu*, the recovery must be against all or none of the defendants.

2. After a default by one of two defendants who have been sued jointly *ex contractu*, the plaintiff can not discontinue as to the other and so amend the declaration as to change a joint liability to a several and individual one, and then enter judgment without notice against the defendant who has suffered a default.

3. After such material amendment a refusal to allow the remaining defendant to plead to the declaration as amended, is error.

[Opinion filed December 7, 1888.]

APPEAL from the Supreme Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. FREDERIC ULLMANN, for appellant.

Messrs. GORTON & BLAINE, for appellees.

MORAN, J. Appellees brought an action against appellant

impleaded with A. B. Meeker. Meeker filed a plea of non-assumpsit, and on his motion a bill of particulars was ordered, which, when filed, showed an account between A. B. Meeker & Company and Tuttle, Masters & Company. After the filing of said bill of particulars appellant was defaulted, and at the January term, 1888, plaintiff discontinued the cause as to A. B. Meeker, without notice to appellant and without taking any rule on him to plead, and, without making any change in the declaration, damages were assessed and a judgment entered against him. At the same term appellant moved to set aside the judgment, but the court refused said motion, but on a cross-motion ordered that the name of Meeker and the word co-partners be stricken from the declaration wherever they occurred therein, and that such other amendments be made therein as might be necessary to show that said declaration was against Wm. L. Brown individually. Thereupon appellant asked leave to plead to the amended declaration, but the court denied such leave.

We are of opinion that the course of practice adopted by the court below in this case was irregular. The action, as it stood at the time Brown was defaulted, was for a joint liability against Meeker and himself. Had the proof shown that such joint liability did not exist it would have been fatal to plaintiff, for the rule is where two or more are sued jointly *ex contractu*, the recovery must be against all or it can be against none.

Brown might be willing to let a judgment go against himself and Meeker; he might have no defense to such action, and yet, after the suit was dismissed against Meeker, he might have a defense by a plea in abatement, because Meeker was not joined with him. He should have been allowed an opportunity at some stage of the proceedings to plead to the amended declaration, and as he had no notice of the dismissal of Meeker, and had not been ruled to plead before judgment, leave should have been given him to plead when the amendment in the declaration was actually made. To dismiss one of two persons sued jointly out of the action, and so change the declaration as to charge a several and individual instead of a joint liability, is to make a material amendment.

Turner v. Klekr.

When such a material amendment is made in the declaration the defendant has the right to plead to the declaration as so amended, and a refusal to permit him to do so is error. *McCarthy v. Neu*, 91 Ill. 130; *Griswold v. Shaw*, 79 Ill. 449; *Johnson v. Glover*, 20 Ill. App. 588.

The court erred in refusing to allow appellant to plead to the declaration when amended, and for such error the judgment must be reversed and the cause remanded.

Reversed and remanded.

JAMES TURNER

V.

HYNEK KLEKR.

Personal Injuries—Elevator Shaft—Invitation to Enter—Instructions.

1. Where one is injured by falling into an elevator shaft in a portion of a meat market which is not open to the public, he can not recover damages therefor unless he entered such part of the premises upon express or implied invitation.

2. In the case presented the question whether it was proper for the plaintiff to go to the place where he was injured except upon invitation, was not submitted to the jury by the instructions given.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Appellant was the owner of a meat packing house in January, 1885, where appellee, who was in the retail butcher business, and others, were in the habit of resorting to buy meats for their trade. On January 27th of that year, between three and five o'clock p. m., appellee called at said packing house to purchase meats in the usual course of his business. The superintendent of the packing house, seeing him, called the foreman, John Paul, to attend to his wants. There was a

business office in the packing house and from twenty to twenty-five feet distant from the office was an elevator shaft, which at that time was unguarded, the car being at some higher point in the building. Adjoining the elevator shaft was the sweat box, where the meats were stored for the purpose of keeping them from freezing.

Paul, under the instructions of the superintendent, after learning what kind of meats appellee wanted, proceeded to the sweat box. Appellee testified that he was told by Paul to come on, and in this he was corroborated by Paul, although there was other evidence tending to discredit both of them on that point. In attempting to follow Paul, appellee fell into the elevator shaft and was injured. Evidence was given tending to prove that the customers were not in the habit of going to the sweat box for meats.

This action was brought by appellee against appellant to recover damages for the injury received by such fall. There was a verdict and judgment for \$1,000 against appellant, from which he appeals.

Messrs. STILES & LEWIS, for appellant.

Messrs. BLUM & BLUM, for appellee.

GARNETT, P. J. One theory upon which this case was tried in the court below, and has been argued here, is that appellee was present at the particular place in the building where the injury occurred without any justification or excuse, unless he was invited there by appellant's foreman. That element we consider the turning point in the case. Whether appellee was so in the wrong or not, was a question of fact for the jury, and should have been submitted under proper instructions.

The first instruction given for the plaintiff was as follows:

"The jury is instructed, as a principle of law, that a customer has a right to expect that reasonable care will be exercised by the occupier of premises to prevent injuries from any unusual danger to which he may be exposed of which the occupier has knowledge or ought to have knowledge. And this is true

Turner v. Klekr.

whether the customer is actually bargaining at the time of the occurrence of the injury or actually buys or not."

Following that instruction the jury might have found a verdict for the plaintiff, while believing that customers were not in the habit of going to the sweat box, and that there was no express or implied invitation to them to go to that part of the building where the elevator shaft was located. That statement is a broader proposition than the authorities sustain. The case is not different in principle from *Zoebisch v. Tarbell et al.* 10 Allen, 385, where it was held that a customer of defendants, calling on business at the shop of the latter and going to a place in the building where customers or visitors were not accustomed to go, without any invitation, express or implied, and without the knowledge or assent of the defendants, or their servants, could not recover damages for injuries received in falling through a trap door in that part of the building where he had no right to be, as he took upon himself the risk of the perils to which he was thus exposed. A similar case is *Grand Tower M. & T. Co. v. Hawkins*, 72 Ill. 386, where the action was brought against the owner of a wharf boat for injuries to appellee, who went upon the boat at an hour when the usual passway for passengers was kept closed and attempted to walk around the boat on the after-guard. There was no evidence that the passway through the boat was insufficient to accommodate the public, or that it was unsafe, or that the owner had invited the public to pass around on the after-guard. The court held that appellant owed no duty to the public which it did not discharge; that while it was its duty to have the passway safe which it permitted the public to use, the rights of the public were limited to that passway and its use when kept open for that purpose. See also, *Murray et al. v. McLean*, Adm'x, 57 Ill. 378.

Taking these authorities for our guide, we have no difficulty in pronouncing the above instruction erroneous. This error was not cured by the instruction for defendant, which informed the jury that if they believed from the evidence that plaintiff approached the elevator against the remonstrance of the superintendent, and that the plaintiff, without the invitation of any

person, walked to the elevator, and, through the want of reasonable care on his part, met with the accident, the defendant was not liable. It will be observed that by the terms of this instruction, before a verdict could be found for the defendant, the jury must have found three separate facts, viz.: (1) remonstrance of the superintendent; (2) absence of invitation from any person; (3) want of reasonable care by the plaintiff. But there is nothing in either of these instructions which can be said to submit to the jury, as a question of fact, whether the place where the injury occurred was or was not a place to which the plaintiff had no right to go unless he was expressly invited. If it was not a place to which he was invited by implication, then the mere absence of express invitation imposed the risk upon him, though there was no remonstrance by any one.

The judgment of the Superior Court is reversed and the cause remanded.

Reversed and remanded.

LELIA P. ROBY

v.

LOUISA MURPHY.

27	394
56	22
27	394
90	210

*Slander—Words Actionable Per Se—Question for Court—"Bitch"—
"Slut"—Instructions—Reversal—Practice.*

1. In an action for slander, where the declaration contains words, some of which are, and some of which are not, slanderous *per se*, it is error to instruct the jury that, in order to entitle the plaintiff to recover, it is sufficient to prove the slanderous words in some one or more of the statements contained in the declaration.

2. It is error to leave the jury to determine what words are slanderous, that question being for the court.

3. The words "bitch" and "slut," where applied to a woman, and taken in their common acceptance, are not actionable *per se*.

4. Where there is manifest error in the instructions, which may have

 Ro'y v. Murphy.

injured the appellant, this court will reverse, unless it appears that such error did not affect the result.

5. When the evidence is conflicting, and the right of the successful party is not clear, this court will reverse for an error in the instructions which may have misled the jury.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the
HON. JOHN P. ALTGELD, Judge, presiding.

This was an action for slander, and the declaration was as follows:

"In the Superior Court, September Term, 1886.

"State of Illinois, }
County of Cook. } ss. "Louisa Murphy, plaintiff, by John
M. Beverly, her attorney, complains
of Mrs. Lelia P. Roby, defendant, of a plea of trespass
on the case; for that, whereas, the plaintiff, before and at
the time of the committing by the defendant of the several
grievances hereinafter mentioned, was a person of good name,
credit and reputation, and deservedly enjoyed the esteem and
good opinion of all her neighbors and other worthy citizens
of this State, yet the defendant, well knowing the premises,
but contriving and maliciously intending to injure the plaintiff,
and to bring her into public scandal and disgrace, on or about
the 30th day of July, 1886, in the county of Cook, aforesaid,
in a certain discourse in which the defendant then and there
had, of and concerning the plaintiff, in the presence and hear-
ing of divers persons, falsely and maliciously, in the presence
and hearing of said persons, spoken and published of and con-
cerning the plaintiff, the false, scandalous, malicious and
defamatory words following, that is to say: 'She,' (meaning
the plaintiff) 'is a thief.' 'She' (meaning the plaintiff) 'steals
everything she can put her hand on.' 'She' (meaning the
plaintiff) 'has stolen my' (meaning the defendant's) 'silver-
ware.' 'She' (meaning the plaintiff) 'has stolen my' (mean-
ing the defendant's) 'jewelry.' 'She' (meaning the plaintiff)
'has stolen my' (meaning the defendant's) 'towels, sheets and

napkins.' 'She' (meaning the plaintiff) 'has stolen my' (meaning the defendant's) 'clothing.' 'I' (meaning the defendant) 'have taken my' (meaning the defendant's) 'clothing off her' (meaning the plaintiff) 'back, which she' (meaning the plaintiff) 'had stolen.' 'She' (meaning the plaintiff) 'has stolen my' (meaning the defendant's) 'flour and sugar, and carried it out the back way.' Meaning and intending thereby to charge that the plaintiff had feloniously stolen, taken and carried away the goods and chattels of the defendant.

"By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in her said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured; to the damage of the plaintiff of \$15,000.

"And for that, whereas also, the plaintiff before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was, and always has been, virtuous and chaste, and was a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of her neighbors and other worthy citizens of this State, yet, the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in her said good name and reputation, and to bring her into public scandal and disgrace, and to cause it to be suspected and believed by divers persons that she was unchaste, on or about the 30th day of July, 1885, in the county of Cook aforesaid, in a certain discourse with the defendant then and there had in the presence and hearing of divers persons, of and concerning the plaintiff, falsely and maliciously, in the presence and hearing of the said persons, spoke and published of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: 'She' (meaning plaintiff) 'is a prostitute.' 'She' (meaning the plaintiff) 'slept with a man in my house, when I' (meaning the defendant) 'was away, and I can prove it.' 'She' (meaning the plaintiff) 'is a dirty bitch.' 'She' (meaning the plaintiff) 'is a dirty, lying slut.' 'She' (meaning the plaintiff) 'is a filthy, lying slut.'

Roby v. Murphy.

"By means of the speaking and publishing of which said several false, scandalous and malicious words by the defendant, the plaintiff has been and is greatly injured in her said good name, credit and reputation, and brought into public scandal and disgrace, and has been, and is, otherwise injured, to the damage of the plaintiff of \$15,000, and therefore she brings her suit, etc."

On the trial the court gave the jury, at the request of the plaintiff, among others, the three instructions following:

"(1.) The court instructs the jury that slander is regarded in law as a malicious wrong and injury, and an action for it has as legitimate a standing in a court of justice as any other action.

"(2.) The court instructs the jury that if they believe from the evidence in this case that the defendant spoke and published, of and concerning the plaintiff, the words charged in the declaration, then the law presumes they were spoken maliciously, and with a view to defame and injure the plaintiff.

"(3.) The court instructs the jury that while it is necessary, to entitle the plaintiff to recover in an action of slander, that she should prove the slanderous words alleged in the declaration, still it is not necessary to prove all the words that are charged to have been spoken. It is sufficient to prove substantially the words in some one or more of the statements of slanderous words contained in the declaration."

The jury returned a verdict in favor of plaintiff, and assessed the damages at \$2,500. The court required the plaintiff to remit \$1,000 of the verdict, and the plaintiff having done so, the court overruled the motion for a new trial and returned judgment against the defendant for \$1,500, and the record is brought here by appeal and error assigned.

Mr. W. N. Low, for appellant.

Mr. M. J. GORMAN, for appellee.

MORAN, J. Several sets of words are set out in the declaration as being false, scandalous, malicious and defamatory,

and among others, in the second count, are the following: "She is a dirty bitch." "She is a dirty slut." "She is a dirty, lying slut." "She is a filthy, lying slut." These words are laid without any *colloquium* going to show that they were used and understood in a slanderous sense. They must therefore be taken in their common acceptance. The word "bitch," when applied to a woman, does not in its common acceptance import fornication or adultery, and is not actionable *per se*. K. v. H., 20 Wis. 252; Schurich v. Kallman, 50 Ind. 336; Logan v. Logan, 77 Ind. 558.

The word "slut," according to Webster, means an untidy woman, a slattern, and also a female dog, the same as "bitch." While such terms undoubtedly are coarse, vulgar and brutal when applied to a woman, they do not amount to a charge of crime or of want of chastity, and are not, therefore, in their common meaning, slanderous words.

The declaration then contained sets of words that were actionable, and also sets of words which were not slanderous or actionable as set out. The third instruction given by the court to the jury told them that it was not necessary, in order to entitle plaintiff to recover, that she should prove all the slanderous words alleged in the declaration. It is sufficient to prove substantially the words in some one or more of the statements of slanderous words contained in the declaration.

This was manifestly erroneous. What are slanderous words is a question of law, and the jury could not tell what were and what were not actionable words, and in any event it was error to leave them to determine what were slanderous words. Carter v. Carter, 62 Ill. 439; Howard Fire Ins. Co. v. Cornick, 24 Ill. 455.

But the undoubted effect of the instruction was not to set the jury to determine what sets of words were slanderous, but to convey to them the impression that all the words stated in the declaration were slanderous, and the proof that the defendant had published any of them against plaintiff would justify a verdict of guilty.

For aught we can see the verdict may in fact rest upon a finding by the jury that the non-actionable words were the

Roby v. Murphy.

ones which defendant was guilty of using. There is, it is true, about the same proof as to one set of words as another, and practically the same conflict in the evidence as to the speaking of all the words alleged, but we can not determine that the verdict finds the speaking of the actionable words particularly in view of this instruction in which plaintiff deemed it prudent to have the jury told that they ought to find a verdict of guilty on proof of the speaking of any of the sets of words. It is not unlikely that the jury would more readily believe that the vulgar and opprobrious epithets had been used than the words imputing fornication or larceny. The graver charge usually requires clearer proof to establish it than the lesser offense.

The rule is that where there is manifest error which may have injured the defendant, there must be a reversal, unless from an inspection of the entire evidence, this court can say that the error did not affect the result.

When there is no conflict in the evidence, or when from all the evidence we can see that the successful party is so clearly right that the same verdict must necessarily have been rendered had the jury been correctly instructed, the case will not be reversed for error in the instructions alone; but when the right is not clear and there is error in the instructions which may have misled the jury, there must be a reversal, that the issues may be determined under proper instructions. *C., B. & Q. R. R. v. Van Patten*, 74 Ill. 91; *Howe Machine Co. v. Rosine*, 87 Ill. 105; *Beard v. Maxwell*, 113 Ill. 440; *Union Stock Yards Co. v. Managhan*, 13 Ill. App. 148; *Frantz v. Rose*, 89 Ill. 590.

A careful inspection of the whole record does not satisfy us that no injury was done to the appellant by the instruction pointed out. Taken in connection with two other instructions set out in the statement of facts, it was calculated to mislead, and it does not affirmatively appear that it did not have that effect.

For error indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

MARY L. LAMBERT ET AL.

V.

FRANCES HYERS ET AL.

*Practice—Reversal of Decree—Defect of Parties—Supplemental Bill—
New Decree—Rule to Plead by Day Certain.*

1. Upon the reversal of a decree by this court for defect of parties and the filing of a supplemental bill to cure such defect, a new decree on the merits is necessary.

2. Under a rule to plead by a day fixed, it is sufficient to plead after the day so fixed, if it is done before default is asked.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. C. M. HARDY, for appellants.

Messrs. GEORGE C. CHRISTIAN and C. H. & C. B. WOOD, for appellee.

GARY, J. The former proceedings in this court in this case are shown in 22 Ill. App. 616. In accordance with the opinion there reported a supplemental bill was filed, alleging the death of Beal, and the succession of Christian to the trust, but, unfortunately, it was supposed in the Circuit Court that the cause was remanded solely to bring in the trustee.

The original decree was gone, by the proceedings in this court. The judgment here was that the decree "be reversed, annulled, set aside, and wholly for nothing esteemed, and for the purpose of correcting the error pointed out in the opinion filed therein," the cause was remanded. The opinion filed was not the judgment of this court, but the reasons for the judgment.

The decree now appealed from is only upon that supple-

Van Ingen v. Brabrook.

mental bill, correcting the error of not having the legal estate represented in the cause, and there is now no decree upon the merits.

The cause should have been wholly reheard, and a wholly new decree on the whole case rendered.

It seems to be the practice, approved by the Supreme Court, that under a rule to plead by a day fixed, if it is done after the day, but before default is asked, it is sufficient. "It is the general practice also to consider such plea, answer or demurrer in due time, if filed before the default is asked for." *Dunn v. Keegin*, 3 Scam. 292. The same rule at law, *Castle v. Judson*, 17 Ill. 381; *Cook v. Forrest*, 18 Ill. 551. The case of *Flanders v. Whittaker*, 13 Ill. 708, to the contrary, is in the minority.

Even if the former decree had not been reversed here, query, whether the mere filing of the supplemental bill did not open it. *Gibson v. Rees*, 50 Ill. 383.

Because there is no decree upon the merits, and because the answer of the appellants was stricken out, the decree must be reversed, and the cause remanded for further proceedings upon the whole case, with the answer of the appellants reinstated, if they wish it.

Reversed and remanded.

EDWARD H. VAN INGEN ET AL.

V.

IDA E. BRABROOK.

27 401
41 60

Husband and Wife—Property—Common Law in Other States—Presumption—Trespass—Alleged Wrongful Levy.

1. In the absence of evidence to the contrary, it will be presumed in the courts of this State that the common law prevails in the other States.

2. Where a wife, who has lived with her husband in Massachusetts and Missouri, brings money to this State and invests it in business in her own name, it will be presumed, in the absence of contrary evidence, that the title to such money and the personal property of the wife vested in the hus-

band. This court so holds, although the investment was made in the name of the wife, and although the goods have been sold and replaced many times, thereby largely increasing the fund.

3. In the case presented, in the absence of such evidence, the judgment against the defendants as trespassers for an alleged wrongful levy of an execution against the husband on the property in question, can not be sustained.

[Opinion filed December 7, 1888].

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. DAVID FALES and A. S. TRUDE, for appellants.

The Supreme Court of this State has repeatedly laid down the rule that if a married woman advances her own separate money, and places the same in the hands of her husband for the purpose of carrying on any general trade, although in the wife's name, and the husband, by his labor and skill in that undertaking, increases the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband. A married woman can not engage in general trade or business with her husband as her managing agent, to which he must devote all his time, energy and skill, and yet place all his earnings and the profits of said business beyond the reach of his creditors. *Wortman v. Price*, 47 Ill. 22; *Wilson v. Loomis*, 55 Ill. 352; *Robinson v. Brems*, 90 Ill. 351; *Snell v. Hannay*, 1 Ill. App. 490; *Card v. Robinson*, 2 Ill. App. 19.

Messrs. FRENCH & MAY, and CRATTY BROS. & ASHCRAFT, for appellee.

A married woman may, with her own means, engage in business, and may employ her husband as her agent, either with or without compensation, and the original investment and all profits will be and remain her own estate. *Langford v. Greirson*, 5 Ill. App. 362; *Dean v. Bailey*, 50 Ill. 481; *Garvin v. Gaebe*, 72 Ill. 447; *Primer v. Clabangh*, 78 Ill. 94; *Blood v. Barnes*, 79 Ill. 437; *Bongard v. Core*, 82 Ill. 19; *Bennett*

Van Ingen v. Brabrook.

v. Stout, 98 Ill. 47; Tomlinson v. Matthews, 98 Ill. 178; Abby v. Deyo, 44 N. Y. 343; Miller v. Peck, 18 W. Va. 75; Cooper v. Hain, 49 Ind. 393; Dayton v. Walsh, 47 Wis. 113.

Per Curiam. Appellee was married to William F. Brabrook in 1863. They resided in Massachusetts for a number of years immediately preceding the year 1880, when they removed to Kansas City, Missouri, where they made their residence until September, 1881. At that time they removed to, and have ever since resided in, Chicago, where appellee, assisted by her husband, has carried on the merchant tailoring business. Appellee owned real estate in Massachusetts, but converted it into money, which was invested in real estate in Kansas City while she was living there. Her husband having failed in the tailoring business in that city, she sold her real estate there, brought the money to Chicago, and soon after invested it, or the larger part of it, on her own account and in her own name, in the tailoring business in Chicago, which business was continued by her until the date of the alleged trespass herein-after stated.

Appellants having an unsatisfied judgment against William F. Brabrook, caused an execution thereon to be issued, and levies made by the sheriff of Cook county on the stock of goods in the store of appellee, supposing and charging that the goods were in reality the property of the execution debtor. This was a suit in trespass, brought by appellee against the execution creditors and said sheriff and one Westrow, for such alleged wrongful levies, judgment being rendered against appellants for \$2,912 in the court below.

It will be observed that the title of appellee must depend on the law of Massachusetts or Missouri, or possibly both. There being no proof of those laws, the presumption is that the common law prevailed in both States, by virtue of which the title to the wife's money and personal property, other than choses in action, vested in the husband. This is the rule, though the money has been invested in goods in the wife's name, the goods sold and replaced many times, and the fund largely increased in amount. We need only refer to the case

of *Hanchett v. Rice*, 22 Ill. App. 442, where this question is carefully considered, and, for this court at least, settled as stated.

On the evidence in this record, the court should have found the defendants not guilty, for the reason here given. There is no other error in the record, but for that set forth the judgment of the court below is reversed and the cause remanded for a new trial.

Reversed and remanded.

27 404
66 267

CHICAGO & ALTON RAILWAY COMPANY

V.

WILLIAM B. SUFFERN ET AL.

Mandamus—Railroads—Discontinuance of Switch Connection—Coal Mine—Constitutional and Statutory Provisions.

1. A railroad company can not discontinue an established switch connection with a coal mine merely because the cars of another company may be taken upon its line over such switch, thereby endangering its property and the lives of its passengers and employees.

2. Where a switch connection has been so discontinued a petition for *mandamus* lies to compel its restoration.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. WM. BROWN, for appellant.

The contract of 1879 can not be made the basis for the writ of *mandamus*.

It is the well established law of this State, and of the common law everywhere, that *mandamus* will not lie to compel the performance of executory contracts. *People v. Dulaney*, 96 Ill. 503; *State v. Zanesville Turnpike Co.*, 16 Ohio St. 308; High on Extraordinary Remedies, Secs. 25, 321; *State ex rel. v. Howard Co. Ct.*, 30 Mo. 375.

Even if it should be allowed that a contract might be made the basis for an application for the writ of *mandamus*, the circumstances in this case are such as that a well founded doubt arises as to whether the petitioners would be entitled to any remedy upon their petition. Granting that the contract was made as alleged in the petition, yet, as in the case of *People ex rel. v. Johnson*, 100 Ill. 537, "by reason of a complication of circumstances not specifically provided for by the statute, a well founded doubt arises, either as to the right of the applicant to receive the fund, or the duty of the officer to pay it out, *mandamus* is not the proper remedy. The right in such cases being doubtful, the claimant must resort to some other appropriate remedy to determine it;" so here, since the right to have the particular switch is so far made doubtful by the act of appellees in admitting another railroad to the use of it, that clear right which must be established before a petitioner can have the writ, can not be said to exist in this case. *People ex rel. v. Klokke*, 92 Ill. 134.

There is no legal duty existing on the part of appellant to restore the connections between its railroad and the mine of appellees.

The principle is well established that where it is sought by *mandamus* to coerce the performance of a particular act, "the party applying must show not only the clear, legal right to have the thing done, but he must show affirmatively that the corporation has the power, and that it is its duty, to do the act in the manner sought." Tappan on *Mandamus*, page 11; *People v. Hatch*, 33 Ill. 69; *Commissioners v. People*, 66 Ill. 339; *Village of Hyde Park v. Thatcher*, 13 Ill. App. 613.

The constitution requires no act upon the part of appellant but simply that it should permit some act to be performed by appellees, and before appellees can complain that they are obstructed in the exercise of that right, they should show that they have taken the steps which are essential to give them the perfect right, and to make the duty of appellant safe, specific and clear. As at common law, so under our statute, the object of *mandamus* is to compel the performance of some particular act or acts of imperative duty due by clear right to the relator,

which he has properly demanded and the respondent has refused. Where the duty is not specific, but general, and its performance as such involves the exercise of judgment and discretion, the writ will not lie. This is elementary law. *Commissioners, etc., v. People*, 19 Ill. App. 253; *Tappan on Mandamus*, 64 and 282.

When the duty is general, "depending upon judgment and discretion, the writ will not lie to compel the performance of the duty, and clearly not in a specific manner." *People v. Dulaney*, 96 Ill. 503; *County of St. Clair v. People*, 85 Ill. 396; *Com. of Highways v. People*, 19 Ill. App. 253.

Where a discretion "in the performance of duty arises, the courts will not attempt to control its exercise except in a palpable case where a plain violation of law is manifested." *Board of School Inspectors v. People*, 20 Ill. 525.

"It is well settled that whenever the act which the petitioner seeks to have performed requires the exercise of discretion, this remedy will not lie." *Hildreth v. Heath et al.*, 1 Ill. App. 83; *Kelley et al. v. Chicago*, 62 Ill. 279; *People ex rel., etc., v. Williams*, 55 Ill. 178; *High on Ex. Rem., Sec. 124*; *Swann v. Gray*, 44 Miss. 392; *Mayor v. Rainwater*, 47 Miss. 547; *People ex rel. v. Metzger*, 47 Cal. 524; *People ex rel. v. Board of Supervisors*, 84 Ill. 303.

The construction and maintenance of switches and the place of location is necessarily left to the sound discretion of the company. "The locality where the openings in the main track should be placed is within the absolute discretion of the company, and can not be re-adjudged by, or at the suit of, a private person resident along the line." *Rorer on Railroads*, Vol. 1, p. 490; *C. & P. R. Co. v. Speer*, 56 Penn. St. 325-335.

Messrs. JOHN M. HAMILTON and CHAS. C. GILBERT, JR., for appellees.

The doctrine is well established by our Supreme Court that a railroad company will be compelled to receive and deliver freight at places established for receiving and delivering freight upon any of its tracks, of which it is the owner or lessee, or can lawfully be used by it. *Vincent v. Chicago & Alton Rail-*

road Co., 49 Ill. 33; People ex rel. Hempstead v. Chicago & Alton Railroad Co., 55 Ill. 95; C. & N. W. Ry. Co. v. The People, 56 Ill. 367; Hoyt et al. v. C., B. & Q. R. R. Co., 93 Ill. 609.

Mandamus lies to compel a common carrier to deliver grain to any elevator on its line. Chi. & N. W. Ry. Co. v. People, 56 Ill. 365. *Mandamus* has been granted to compel a railroad company to build a bridge. Com. & S. v. Charleston R. R., 7 Met. 70. To re-instate its road after the rails have been taken up. Rex v. Severn & Wye R., 2 B. & A. 646.

To receive merchandise for shipment. Ex parte Robbins, 7 Dan. & P. C. 566. To restore an abandoned station. State of Conn. v. N. H. & N. Co., 37 Conn. 165. To furnish and maintain stations for passengers and freight at all proper points on its line. State, etc., v. Republican Valley R. R. Co., 17 Neb. 647; Munn v. Ill., 94 U. S. 113; State v. Neb. Tel. Co., 17 Neb. 126; Messenger v. Penn. Railroad Co., 36 N. J. 407.

"Duties and obligations imposed by statutes are always enforced by *mandamus* unless some other mode is prescribed by statute." 2 Redf. on Railways, 276-277.

"And, in a word, to do whatever is required by law." 2 Redf. on Railways, 278-279; 6 Bacon's Ab. 428.

"The law orders those parties to perform the duty if they build the road." Lord Denman, C. J., in Reg. v. Trustee Luton Roads, 1 Q. B. 680.

"When a person desires to be placed in the possession of a right illegally and unjustly withheld from him, and not damages for the injury done him, the writ of *mandamus* is a proper remedy to give the thing itself, the withholding of which constitutes the injury complained of." Mobile & Ohio R. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Moses on Mandamus, 14.

"All judges and jurists will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by *mandamus* to do it." State v. Hartford & New Haven R. R. Co., 29 Conn. 538; People v. N. Y. C. & H. R. R. Co., 28 Hun, 549.

"We can not bring our mind to entertain a doubt that a railroad corporation is compelled by *mandamus* to exercise its duties as a carrier of freight and passengers." *Id.*, citing *Abbott v. Johnson R. R. Co.*, 80 N. Y. 31.

"Private persons may, without the intervention of the government law officers, move for a *mandamus* to enforce a public duty, not due the government as such. This is true in all cases where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest." *U. P. R. R. Co. v. Hall*, 91 U. S. 343.

"The writ should be to re-instate and lay down again." *Reg. v. Severn & Wye Ry.*, 2 B. & A. 652.

It is no sufficient excuse to say that respondent's road is no longer necessary for the shipment of complainant's coal. *Redf. Law of Railways*, 648; *C., B. & Q. R. R. Co. v. Hoyt*, 1 Ill. App. 385.

GARY, J. Stripped of their verbiage, the pleadings in this case present this state of facts: In 1879, under a contract between the parties, the appellants constructed a switch by which cars from the line of their road could be taken to a coal shaft of the appellees and returned to the line, thereby furnishing facilities for the appellees to send their coal to market. This condition of things continued until 1887, during all which period appellants furnished to appellees, over this switch, such cars as appellees required for the transportation of their coal, when, by another company, another line of road was constructed, to which the appellees obtained access by a switch so constructed that cars of that other company can be, over the switch connected with appellants' road, taken upon their line. Thereupon the appellants disconnected the switch from their line, and allege as the reason for so doing, that as the cars of the other company could, over that switch, be taken upon their line, it was dangerous to the lives of their passengers and employes, and to their property, to continue it. The appellees filed their petition for a *mandamus* to compel the appellants to restore the connection, and thereafter furnish cars for their coal, as before, and rely upon the former course of busi-

ness between the parties, and upon Sec. 5, Act 13, Cons. of 1870, that "all railroad companies shall permit connections to be made with their tracks so that any * * * coal bank * * * may be reached by the cars of said railroad," and upon paragraph 84, Chap. 114, Starr & Curtis' Rev. Stat.: "Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads, and at the junction of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and 'places' on and for all trains advertised to stop at the same for passengers and freight respectively, upon the due payment or tender of payment of tolls, freight or fare legally authorized therefor, if payment shall be demanded," etc.

The appellants say that the provision of the constitution is not self-executing, and, if it were, the manner of connecting is so various under differing circumstances, that *mandamus* is not an appropriate remedy.

If any degree of certainty as to the manner of connecting in the best way would avail the appellees, the conduct of the parties for the eight years furnishes it; and upon the authority of *Vincent v. C. & A. R. R. Co.*, 49 Ill. 33, if a court of chancery could adapt its process to the relief to which the appellees are entitled, that court would do what appellees now ask to have done, unless the reason for denying it assigned by the appellants is good.

C. & N. W. Ry. Co. v. People, 56 Ill. 365, is authority that if the appellees are entitled to the relief they ask, *mandamus* is an appropriate remedy.

And so the whole case turns upon the question whether the fact that a trespass upon the property of the appellants might be committed through the facilities furnished by this switch, and thereby the appellants exposed to great injury and loss, is a good cause for discontinuing it. It is obvious that no such

trespass can be committed by the other company except over the premises of the appellees, who had it in their power, physically, for eight years, to push cars upon the main line of appellants' road, but never abused that power.

No motive can be conceived for anybody to do it. The same facilities exist in thousands of places all over "the land of the free and the home of the brave," and the nation is not unhappy.

In a case where such large interests are involved, if the real merits of the case are apparent, it is not worth while to spend any time upon the niceties of the special pleading.

The judgment being such as the appellees are entitled to, upon the merits, it is affirmed.

Judgment affirmed.

JOHN R. BENSLEY ET AL.

V.

HORACE L. BROCKWAY.

27 410
44 318
27 410
50 390
50 511
51 102
51 177
51 276
53 520

Partnership—Action to Charge Several Defendants as Partners—Joint Liability—Discontinuance as to Part—Sec. 35, Chap. 110, R. S.—Evidence—Motion to Strike Out—Agency—Admissions—Ratification—Set-off—Instructions—Pleading—Practice.

1. In an action seeking to charge two or more defendants as partners, Sec. 35, Chap. 110, R. S., only relieves the plaintiff from the burden of proving joint liability "in the first instance," and leaves the defendants at liberty to disprove it without first denying it by plea.

2. In such a case, where the plaintiff discontinues as to certain of the defendants, it is error to deny a motion to strike out evidence previously admitted of admissions by one of them to charge the defendants as partners.

3. There can be no ratification of an alleged contract entered into with an agent acting without authority, unless the principal is in possession of a knowledge of the facts.

4. The statements of an agent are admissible against the principal only where they are part of the *res gestæ*.

5. In the case presented, the court should have allowed the remaining

Bensley v. Brockway.

defendants to file a plea of set-off after the discontinuance as to the others. Prior to that time they could not plead a set-off due to themselves only.

6. It seems to be unnecessary to change the pleadings upon a discontinuance as to part of the defendants, whom it is sought to charge as partners in an action *ex contractu*.

7. It is error to give an instruction having no basis in the evidence.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. CHARLES W. NEEDHAM, for appellants.

Messrs. FLOWER, REMY & HOLSTEIN, for appellee.

GARY, J. This action of assumpsit was brought against seven defendants, John R. Bensley, George E. Bensley, M. C. Scoby, Charles R. Bensley, H. O. Hough, D. C. Hough and W. H. Reed. The only plea was a joint plea by all of non-assumpsit.

On the trial the appellee relied for a recovery upon his own testimony as to a contract made by him with Charles R. Bensley for employment of the appellee by the firm of Bensley Bros. & Co. as a salesman, and upon the testimony of the defendant Reed, as to a conversation between himself and Charles R. Bensley in relation to such employment about the time appellee began work.

When appellee rested his case appellants offered to prove that the three first named defendants composed the firm of Bensley Bros. & Co., for which the appellee worked, and that the other four were not members, but only employes of the firm. To this the appellee objected, and his objection being overruled, he excepted, and now assigns the admission of that evidence as a cross-error. It is material to decide now whether that evidence was properly admitted, because, after it was in, the appellee having no rebutting evidence on that subject, was driven to discontinue as to those four, and then the appellants moved to strike out the testimony of Reed, it

being only as to a conversation with a person not party to the suit, nor jointly liable with the then defendants, now appellants. This motion was denied, and appellants excepted, and now assign that for error.

Charles R. Bensley, as the case now stands on the record, is to be considered only as an employe of the firm. Whether he had or had not their authority to employ other employes, is a matter disputed between the parties. But if he had such authority, his conversation with Reed was not had as a part, or in the course, of any business he was doing for the firm, but, at the most, could only be said to be a consultation with another employe upon a subject that there is no claim by the appellee that Reed had any authority over, if he was not a partner.

"The statements of an agent are admissible only where they are a part of the *res gestæ*." *Whiteside v. Margarel*, 51 Ill. 507; *Story on Agency*, Secs. 134-137; 1 *Greenl. Ev.*, Sec. 113; *Lindblom v. Ramsey*, 75 Ill. 246.

The refusal of the court to strike out the testimony of Reed was therefore error, unless the appellee can maintain that the admission of the evidence that the firm was composed only of the appellants was error, and, therefore, as Charles R. Bensley and Reed ought to have been held, they should still be considered as partners, and as partners their declarations are evidence against the firm. Reed's testimony can not be held to be immaterial. Whether logically or not, the jury must have regarded it, when the court refused to strike it out, as tending to show that the appellants had employed the appellee upon the terms he alleged.

The appellee relies upon Sec. 35 of the Practice Act of 1872, as follows:

"In actions upon contracts, express or implied, against two or more defendants, as partners, or joint obligors, or payors, whether so alleged or not, proof of the joint liability or partnership of the defendants, or their Christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a

Bensley v. Brockway.

plea in bar denying the partnership or joint liability, or the execution of the instrument sued upon verified by affidavit."

He cites a long line of decisions in this State and by the Supreme Court of the United States, in which the construction of this statute was involved, in some of which, as *Shufeldt v. Seymour*, 21 Ill. 524, and *Huntington v. Chambers*, in the Third District, 15 Ill. App. 426, the effect of the decision is, that if the defendant does not, by plea, in the manner provided by the statute, deny the joint liability, he is estopped to deny it by evidence on the trial.

This court has held that the proper construction of the statutes is that it only relieves the plaintiff from the burden of proving that joint liability, "in the first instance," and leaves the defendants at liberty to disprove it, without first denying it by plea. *Davison v. Hill*, 1 Ill. App. 70; *Garland v. Peeney*, 1 Ill. App. 108; *Rosenberg v. Barrett*, 2 Ill. App. 386.

This distinction has not been discussed in any of the cases cited by the appellee, nor does it appear that any of the courts by which such decisions were made ever had their attention called to it. But in a case involving the construction of another section of the statute, before the last revision, where the arguments of the appellee applied with greater force than to the statute under consideration, the Supreme Court have made and sustained the distinction.

It was provided by the 59th section of the Practice Act of 1845, that "in actions upon bonds, notes and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignments or signature of any assignor, unless the fact of the assignment be put in issue by plea verified by the affidavit of the defendant, or some credible person, stating that he verily believes the facts stated in the plea are true."

Comparing this section with the 14th of the same act, which provided that "no person shall be permitted to deny on trial the execution of any instrument in writing * * * unless the person so denying the same shall, if defendant, verify his plea by affidavit," they say: "The language of the 59th section is different from the other. It dispenses with proof of

the assignment, before the instrument is admitted, unless the act of assignment is denied by plea, verified by affidavit, whilst the maker, under the 14th section, is not permitted to deny the execution of the instrument except in that mode. This section does not prohibit the defendant from denying the assignment by rebutting evidence. It only provides that until the assignment is denied in the mode indicated, the plaintiff shall not be required to make the proof. * * * We think a fair and reasonable construction of these two provisions justifies the distinction that under the one the maker can not deny the execution of the instrument either before or after it is introduced, while under the other he can not deny it before, but may after, its introduction in evidence. The assignment indorsed upon the note is made *prima facie* evidence of its genuineness, but does not preclude the defendant from rebutting that fact. Or, if he chooses, he may, by denying it by plea, verified by affidavit, throw the burthen of the proof on the plaintiff *in the first instance*." These italics are not in the opinion of the Supreme Court. Lockridge v. Nuckolls, 25 Ill. 178.

The language in the section to be construed now, is, "proof * * * shall not, in the first instance, be required." In the 59th section quoted it was "the plaintiff shall not be held bound to prove." The introduction of the words "in the first instance," imply that there might come a time in the action when the proof would be required even without the plea; while from the words of the other section it might be plausibly argued that the plaintiff could never "be held bound to prove" without the plea.

It follows that the Superior Court did not err in admitting the evidence that the appellants only composed the firm of Bensley Bros. & Co., and that it did err in not striking out the testimony of Reed.

The appellants objected to the case going to the jury on the pleadings as they stood after it had been dismissed as to four of the defendants, and their objection being overruled, they excepted, and now assign that action of the court for error. No authority is cited to support this assignment. It has never been deemed necessary, in actions *ex delicto*, to make any

Bensley v. Brockway.

change in the pleadings upon a discontinuance as to one or more of the defendants, nor does there seem to be any need of doing so in actions *ex contractu*.

The second instruction for the appellee was as follows :

"The plaintiff alleges that the contract was made between him and Charles R. Bensley, who, plaintiff claims, represented the firm of Bensley Bros. & Co., and that the contract was afterward ratified by John R. Bensley, the senior member of that firm.

"The defendants allege that the contract was made with John R. Bensley, and that Charles R. Bensley had no authority to make contracts for the firm. These are questions of fact for the jury to determine from the evidence in the case. But, upon the question as to the authority of Charles R. Bensley to make the contract, the court instructs you, as a matter of law, that the jury are not bound to take the statement of the witness, John R. Bensley, upon this point as conclusive; but the jury have the right to determine, from all the evidence and circumstances in the case, whether or not Charles R. Bensley had authority to make such a contract. And the court also instructs you that, even if Charles R. Bensley did not have authority to make the contract, but still, if it was made by him, as plaintiff alleges, and was afterward acted upon by the parties, and ratified by the firm of Bensley Bros. & Co., then it will be binding upon that firm."

The appellee testified that this contract, made with Charles R. Bensley, was for \$150 per month or \$1,800 per year.

John R. Bensley and Charles R. Bensley testified that the contract was made by appellee with John R. Bensley for the salary named, provided his commissions amounted to that salary; but if they did not, he was to receive only so much salary as his commissions should amount to. There was no evidence of any authority for Charles R. Bensley to employ appellee, except that appellee did work for appellants, and he says, under no other than his contract with Charles R. Bensley; and there was no evidence whatever, that John R. Bensley or any other member of the firm knew, while appellee worked for the firm of Bensley Bros. & Co., that he claimed any such contract as he relied upon at the trial.

Without knowledge of the facts, there could be no ratification. *G., C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Kerr v. Sharp*, 83 Ill. 199.

Instructions upon a hypothesis which there is no evidence to support are, if material, erroneous. The cases to this effect are so numerous and well known, that it would be useless to cite any of them.

The court should have allowed the appellants to file a plea of set-off when the case was dismissed as to the other four defendants. While the case stood against seven defendants, appellants could not plead a set-off due to themselves only. When they became the only defendants such a plea was admissible. *Brown v. Tuttle*, *ante*, p. 389.

While a defendant is not allowed to present his defense piece-meal and may not file additional pleas after he has already on the files one or more, yet when the plaintiff so changes his ground as to make a defense of a certain character for the first time available, justice requires that he should be permitted to make it.

For the errors in refusing to strike out the testimony of Reed, and in giving the second instruction, the judgment is reversed and the case remanded.

Reversed and remanded.

ARCHIBALD HAAS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Pharmacy Act—Liability of One in Charge of Drug Store—Sec 12.

1. Where a registered pharmacist is employed and placed in charge of a drug store, he becomes personally liable for the statutory penalty if he permits one who is not a registered pharmacist as assistant to vend drugs, medicines or poisons in his store.

2. An instruction to a boy, to sell anything in a drug store except poisons, leaving him to judge what are poisons, is a violation of the statute.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. WILLIAM H. SISSON and CLARENCE F. GOODING, for appellant.

Messrs. JOHN M. HAMILTON and CHARLES C. GILBERT, for appellee.

GARNETT, P. J. This appeal presents for consideration a question of construction of the act entitled, "An act to regulate the practice of pharmacy in the State of Illinois," approved May 30, 1881, and in force July 1, 1881. The first section of the act in question provided that it shall not be lawful for any person, other than a registered pharmacist, to retail, compound or dispense drugs, medicines or poisons, or to open or conduct any pharmacy or store for retailing, compounding or dispensing drugs, medicines or poisons, unless such persons shall be, or shall employ and place in charge of said pharmacy or store, a registered pharmacist, etc. Sec. 2 describes the qualifications of registered pharmacists. Sec. 12 enacts that any registered pharmacist who shall permit the compounding and dispensing of prescriptions, or the vending of drugs, medicines or poisons in his store or place of business, except under the supervision of a registered pharmacist, or except by a registered assistant pharmacist, shall, for every such offense, be liable to a penalty of \$50.

Merz Bros., being the owners of a drug store in Chicago, where drugs, medicines and poisons were retailed, compounded and dispensed, employed the appellant, a registered pharmacist, and placed him in charge of the store. In the month of September, 1886, while appellant had such charge of the store, a boy, named Goddard, was also employed there by Merz Bros. He was instructed by August Merz (one of the firm of Merz Bros.), as well as by appellant, that he might sell anything in the store except poisons. Appellant testified that he

supposed it was for the boy to judge what were poisons. In the latter part of September, 1886, when appellant was absent at dinner and the boy was left in charge of the store, an application was made by Charles W. Day, to purchase some poisons, and the boy sold and delivered them to him. The appellant was summoned before a justice of the peace for the recovery of a fine for this alleged violation of the statute. The justice rendered judgment for \$50, and the Criminal Court of Cook County, on appeal, rendered a similar judgment, which appellant now seeks to reverse. He claims that as the store was not his, but belonged to Merz Brothers, and as the boy was hired and could be discharged by them only, no penalty can be inflicted on a mere co-employee of the boy. If such was the intention of the legislature, the enactment is a lame and impotent conclusion. If the registered pharmacist employed to take charge of the store is not chargeable with the penalty, neither is the owner, if he is not a registered pharmacist. Thus, any person, who has not qualified himself to discharge the responsible duties required by the statute, may employ a person who has qualified himself, and the latter may, without fear of the prescribed penalty, permit any boy, or unskilled person employed in the store, to sell the prohibited articles, and the efficiency of the law becomes seriously impaired. A more reasonable interpretation is, that when a registered pharmacist is employed and *placed in charge* of a store of that character, although he is not the owner of it, the place does thereby become his place of business within the meaning of said Sec. 12. The terms of Sec. 1 show plainly that the legislature contemplated cases where persons not having the requisite qualifications, would employ and place in charge of such stores a registered pharmacist, and yet it is supposed that when the penalty, the effective part of the law, is reached, the intention was to devise a plan of escape for an entire class to whom special attention was devoted in the first section. The language of Sec. 12 does not require an interpretation so unreasonable, nor are we disposed to interfere with what appears to have been the design of the law; that is, that some person qualified by study and training, should have

Butt v. Lee.

charge of the retailing, compounding and dispensing of drugs, medicines and poisons, and should be responsible for permitting, in the place of business of which he has charge, any person, not qualified, to be engaged in work so dangerous to the public.

The law makes it the duty of the owner to have in charge of his store a registered pharmacist. It is the corresponding duty of the latter to take charge, if he accept the employment. Taking charge of the store in this instance means something more than nominal representation of the owner. He is the person who must decide and control as to the sale of drugs, medicines and poisons. The owner can not pretend to put him in charge, and at the same time employ an unskilled person in the same store who is independent of him as to such sales. The registered pharmacist who enters upon the charge of such a store, upon such conditions, does so at his peril.

That appellant, in substance, permitted the boy to make such sales, we think is shown by his own evidence. He says he told the boy he might sell anything in the store except poisons, and left him to decide what were poisons. To have fairly complied with the law, he should, at least, have told the boy what the excepted articles were. We can not presume the boy knew poisons from harmless syrups, and, unless he did, the saving clause in the instruction given him by appellant, was a dead letter, and failed to modify the sweeping direction to sell.

The judgment of the Criminal Court is affirmed.

Judgment affirmed.

CHARLES BUTT

v.

JOHN P. LEE.

Practice—Defective Record—Motion for New Trial—Clerk's Statement

1. Where the bill of exceptions contains no motion for a new trial, and no exception is preserved to the overruling of such a motion, an assignment

of error that the court erred in refusing a new trial on the ground that the verdict was contrary to the evidence, can not be considered by this court.

2. A statement in the judgment order, as copied by the clerk into the record, to the effect that the motion for a new trial was overruled and a new trial denied, does not make such motion a part of the record.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. JESSE B. BARTON, for appellant.

Mr. WALTER M. HOWLAND, for appellee.

MORAN, J. Appellant brought an action against appellee, alleging a breach of a certain contract, and claiming liquidated damages in the sum of \$3,000, as provided by the contract.

The case was tried by a jury, and a verdict found in favor of plaintiff, but the damages were assessed at \$50.

The only error assigned on this appeal is that "the court erred in refusing a new trial on the ground that the verdict was contrary to the evidence."

There is in the bill of exceptions no motion for new trial set out, and no reference whatever to any such motion. In the judgment order of the court, as copied into the record by the clerk, it is stated that the plaintiff's motion theretofore entered therein for a new trial in said cause is overruled and a new trial denied, but such statement by the clerk does not make a motion for a new trial a part of the record. There is nowhere in the record any exception preserved to the overruling of any motion for a new trial, and hence the error assigned can not be considered by this court. *Smith et al. v. Kahill*, 17 Ill. 67; *Boyle v. Levings*, 28 Ill. 314; *Duncan v. Chandler*, 5 Ill. App. 499; *Deitrich v. Waldron*, 90 Ill. 115.

The judgment must therefore be affirmed.

Judgment affirmed.

CORNELIUS SULLIVAN
V.
CONRAD L. NIEHOFF ET AL.

37 421
44 302

Injunctions—Bill for Relief from Judgment—Service—Evidence—Usury—Payments.

1. The unsupported evidence of the defendant denying service of process, is insufficient to sustain a bill for relief from a judgment on the ground that he was not served.
2. The declarations of a party are not evidence in his favor.
3. Where a defendant in a suit at law has neglected to make his defense, he can not have relief in equity from a judgment which includes usurious interest.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

Mr. A. B. BALDWIN, for appellant.

No principle is better established than that so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of the usury from the part remaining unpaid. *Saylor v. Daniels*, 37 Ill. 331; *Farwell v. Meyer*, 60 Ill. 367; *Driscoll v. Tannock*, 76 Ill. 154; *Jenkins v. Greenbaum*, 95 Ill. 11; *Harris v. Bressler*, 119 Ill. 467.

Mr. M. J. DUNNE, for appellee.

The Supreme Court has several times held that a return of an officer can not be impeached, except by the clearest and most satisfactory evidence, and that the testimony of the party upon whom service purports to have been made, is not sufficient to authorize the setting aside of the return of a sworn officer. *Davis v. Dresback*, 81 Ill. 395.

It was held in *Leitch v. Colson*, 8 Ill. App. 458, in this court, that a return to process by a constable is, as between the parties, conclusive, and can not be contradicted by parol evidence.

To the same effect is *Fitzgerald v. Kimball*, 86 Ill. 396. In *Hunter v. Stoneburner*, 92 Ill. 75, it is said: "It then appearing that appellee was served with process, he must be bound by the officer's return. It is in rare cases only that the return of the officer can be contradicted, except in a direct proceeding by suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive."

A bill to restrain the collection of a judgment should show what the evidence was which authorized the judgment complained of, and the grounds of defense, and the reason, if any, why it was not made, and such other facts as would make a case, or there will not be error in dismissing the bill. *Buntain v. Blackburn*, 27 Ill. 406.

Although a judgment at law may be unjust, yet, where a legal defense existed, and the defendant had an opportunity to make the same, and by his own neglect failed to do so, he can obtain no relief in equity. *Higgins v. Bullock*, 73 Ill. 205; *Hopkins v. Medley*, 99 Ill. 510.

GARY, J. The questions in this case have been often decided adversely to the appellant. He filed his bill for relief from a judgment at law on the grounds that he was never served with process; that payments had not been credited, and that usurious interest was included in the judgment. The return shows service, and the deputy sheriff testifies to it; appellant testifies to the contrary, and seeks to corroborate his statement that he was not at the place where the deputy says the service was made, by his own statement that he went to Valparaiso that day, and by the testimony of two other witnesses, one of whom says he saw appellant get on a train that was starting out of the depot about 8 o'clock in the morning, and the other that he saw him in the evening just as the train arrived from the East, and appellant said he "was down to Valparaiso." The deputy testified that the service was between 3 and 5 o'clock in the afternoon. It was obvious that, leaving out what appellant said to the witness, that "he was down to Valparaiso," the testimony of the deputy and of the

 Skakel v. Roche.

witnesses for appellant, is not inconsistent, and both may be true. His declaration that he "was down to Valparaiso" was no evidence in his own favor that he was there. *Brown v. Lusk*, 4 Yerg. 210.

The fact of service, therefore, is disputed only by his own testimony. This is not enough. *Hunter v. Stoneburner*, 92 Ill. 75; *Davis v. Dresback*, 81 Ill. 393.

In addition to the legal conclusion, it appears that in fact the appellant knew that he was sued, as before the return day he wrote to the attorney of the plaintiff as follows :

"Yours of the 20th inst. duly received; contents noted; in reply would say it seems to me to be a rather strange proceeding that you should now have been authorized by Mr. Niehoff to commence legal proceedings on a note that I have been already sued on. How is this? Please explain, or is this some more of Niehoff's crookedness? Get two judgments. collect twice more? I imagine he has been pretty near paid already. When Mr. Niehoff wants to settle with me square and honest, he has got my address. It looks rather foolish to write a letter threatening a law suit that I have been already served on and that I have put into the hands of an attorney."

Having neglected any defense that he had at law, he can not now come into equity for relief, if usurious interest was included in the judgment. *Smith v. Powell*, 50 Ill. 21. Nor if payments were not credited. *Mellendy v. Austin*, 69 Ill. 15

The bill was rightly dismissed.

Decree affirmed.

WILLIAM SKAKEL
v.
JOHN A. ROCHE ET AL.

27	423
388	317

Injunctions—Criminal Prosecutions—Saloon—Ordinances.

1. Courts of chancery have no jurisdiction to enjoin criminal or quasi criminal prosecutions.

2. This court affirms a decree dismissing a bill to restrain the mayor and chief of police of the city of Chicago from interfering with the complainant in conducting a saloon, and from prosecuting him under ordinances which he alleges to be void.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon HENRY M. SHEPARD, Judge, presiding.

MESSRS. EDGAR TERHUNE and A. B. JENKS, for appellant.

The ordinance in question is void. The legislature has, by express terms, delegated to the city council, and the city council alone, the right to license, regulate and prohibit the liquor traffic. Nowhere in said enactment can anything be found which confers any power in the premises upon the mayor. The language of the act is unambiguous, and the most liberal construction of which that language is susceptible will not permit of any conclusion inconsistent with an expressed power in the city council.

It has been determined by almost every court of final resort in the United States, that the legislature can delegate its constitutional powers to license, regulate and prohibit the liquor traffic to whatsoever depository it may, in its wisdom, see fit to select. But it has always been held that the depository elected by the legislature, and that alone, can act.

The record in this case by a practical illustration proves, to the certainty of a mathematical demonstration, that to allow the depository chosen by the legislature (the city council) to delegate to the mayor of the city the power to grant licenses to such persons as he may in his discretion deem proper, and to refuse licenses in his discretion, must be a departure from the fundamental principles of law.

To say that the city council has not abdicated and surrendered its power to the mayor, were idle. There is a clear delegation. The city council can no more so do under the pretense of giving the mayor power to inquire into character, etc., of applicants, than it can do so by a general ordinance wherein it boldly states its intention to abdicate. It can not accom-

plish by indirect means, what the law will not countenance. *Zanone v. Mound City*, 103 Ill. 557.

Without further comment we submit the following authorities on this branch of the case: *Cooley's Const. Lim. Sec.* 204, notes 1 and 2; *Dillon on Municipal Corp.*, Secs. 60 and 96; *City of East St. Louis v. Wehrung*, 50 Ill. 28; *City of East St. Louis v. Wehrung*, 46 Ill. 392; *Kinmundy v. Mahan*, 72 Ill. 462; *Foss v. Chicago*, 56 Ill. 354; *In re Wilson*, 32 Minn. 145; *Cooley's Const. Lim.* 197; *Zanone v. Mound City*, 11 Ill. App. 334; *State v. Fisk*, 9 R. I. 94; *Thompson v. Schermerhorn*, 6 N. Y. 92; *Ruggles v. Collier*, 43 Mo. 353; *Hyde v. Joyce*, 4 Bush. 464; *Lyon v. Jerome*, 26 Wend. 485; *State v. Patterson*, 34 N. J. 168; *Davis v. Reed*, 65 N. Y. 566; *Thompson v. Boonville*, 61 Mo. 282; *Clark v. Washington*, 12 Wheat. 40, 54; *Day v. Green*, 4 Cush. 433, 1849; *Coffin v. Nantucket*, 5 Cush. 269; *White v. Nashville*, 2 Swan, 364.

It is well settled that equity will not interpose to prevent criminal prosecution on the sole ground that the individual is innocent and unjustly persecuted, or because he is being prosecuted under void and unconstitutional ordinances or legislative enactments. He has his remedy at law, and courts of chancery can not be compelled to assume jurisdiction. But where from the face of the record the element of "irreparable injury" appears, a different rule applies. In such cases equity will protect the unfortunate. There is always a remedy somewhere. If it does not exist at law then it must be in equity, and if it be shown that the remedy at law is not complete and adequate, and does not completely and adequately protect the complainant in his life, his liberty or his property, then equity will take jurisdiction.

That in the case at bar the court may interpose by injunction, see *Wood v. City of Brooklyn*, 14 Barb. 425; *Third Ave. R. R. v. Mayor, etc., of N. Y.*, 54 N. Y. 159; *Gartside v. City of E. St. Louis*, 43 Ill. 47; *Butler's Appeal*, 73 Pa. St. 448; *Mayor of Baltimore v. Radecke*, 49 Md. 217; *Page's Case*, 34 Md. 564; *Mayor of New York v. Pilkington*, 2 Atk. 302; *Frewin v. Lewis*, 4 Mylne & Craig, 249; *Wahle v. Rem-*

back, 76 Ill. 322; Met. City Ry. Co. v. Chicago, 96 Ill. 620; Goodell v. Lassen, 69 Ill. 145; Cited by Butler's Appeal, 73 Pa. St.; Philadelphia Ass'n v. Wood, 3 Wright, 73; Owens v. Gross, 105 Ill. 354.

Messrs. CLARENCE A. KNIGHT and JOHN W. GREEN, for appellee.

Per Curiam. Appellant filed his bill in the court below, praying for an injunction to restrain the mayor and chief of police from interfering with him in conducting a saloon, and from criminally prosecuting him under ordinances which he alleges to be void, and from prosecuting more than one of the suits commenced against him and pending until the further order of the court.

The court denied appellant's motion for an injunction, and it was stipulated by the parties that the hearing of the motion should be considered the final hearing of the cause, and therefore the court entered an order dismissing complainant's bill for want of equity.

Appellant had no license for the sale of liquor, and because he persisted in selling intoxicating liquors without such license, he was repeatedly arrested by the police and subjected to fine by the police magistrate.

The general rule is well settled, and has been repeatedly announced in this State, that a court of equity will not entertain a bill to restrain prosecutions under a municipal ordinance on the ground of the alleged illegality of such ordinance. The validity of an ordinance of the character involved here can only be tested by appeal from a fine imposed under it. Courts of chancery have no jurisdiction to enjoin criminal or *quasi* criminal prosecutions. Counsel for appellant admit this general rule, but contend that there are exceptions to it, and insist most earnestly that the facts charged in the bill take this case out of such rule and entitle appellant to relief sought. We have carefully examined the facts as shown by the record, and have considered the authorities cited by counsel in support of their contention, and we are of opinion that no case has been

Keeler v. Grace.

made out which gives appellant a standing in a court of equity. We can not afford the time which would necessarily be taken to discuss fully the cases cited by counsel, and to distinguish those on which they rely from the case here presented.

We must content ourselves with saying that the judgment of the Circuit Court must be affirmed.

Decree affirmed.

JAMES H. KEELER
V.
MAURICE F. GRACE.

Brokers—Sale of Real Estate—Commissions—Defective Instruction.

1. Where real estate is placed in the hands of a broker with instructions to sell at a given price and through his instrumentality a party is brought into negotiation with the owner and a sale is in consequence effected by the owner, the broker is entitled to commissions.

2. It is sufficient to entitle the broker to compensation that the sale is effected through his agency as a procuring cause.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. JOHN C. SCOVEL, for appellant.

Mr. THOMAS J. WALSH, for appellee.

MORAN, J. Appellant brought an action against appellee to recover commissions upon the sale of real estate. It appears that appellee, about September 14, 1885, left a description of his property with appellant, who is a real estate broker, to sell at the price of \$7,500. Appellant advertised the property and, in November, one Ryan called at appellant's office and inquired what property he was advertising on West 12th

Street and appellant told him it was No. 325, and was owned by appellee Grace, and stated the price. Ryan asked appellant Keeler to see Grace and try to make a trade for some property which Ryan had and Keeler sent for Grace and submitted the offer to him, but Grace, after examining the property, declined to make the trade, but instructed Keeler to try to sell to Ryan for money. Ryan could not pay so much cash as Grace required just at that time. Ryan and Grace met during the negotiations, which ran along into the month of January, and during the time Grace raised the price of the property to \$8,000.

On the 4th of May, Grace went to Keeler's office and stated to Keeler that he wanted to withdraw the property from the market; that he did not want to sell it.

On the same day Grace executed a deed to one Mathew Lamb, conveying the property in question, and it clearly appears that the property was taken by Lamb for Ryan and he conveyed it to Ryan a short time thereafter.

The purchase price paid to Grace was \$8,000. Appellant's contention was that the property was sold by appellee to Ryan for the same price for which he had it on his books, and that he, by his advertisement and negotiations, brought the purchaser to Grace, and that he was prevented from making the sale only by appellee taking the property out of his hands on the pretense that he was not going to sell it.

Appellee claimed to the jury that he sold his property through another real estate firm, who wrote to him that they had a purchaser, and that he did not know when he conveyed the property to Lamb that Ryan was the real purchaser.

The issue of fact was for the jury to determine, and if the question had been fairly left to the jury the verdict might rest undisturbed. But the court erred in giving to the jury at the request of appellee, the following instruction numbered 2: "The jury are instructed that to entitle the plaintiff to recover any commissions, it is necessary for him to prove that he was employed by the defendant and acting under the defendant's employment, and was authorized by the defendant at the time to make the sale, and while so acting effected the sale of defendant's property."

Eggers v. Hanchett.

This instruction does not state the law correctly. If a description of property is given to a real estate broker by the owner with instructions to sell it at a given price, and through the agency and instrumentality of the broker a party is brought into negotiations and dealing with the owner, which actually result in a sale of the property at the price fixed, to the broker's customers, the broker will be entitled to his commissions, even though the sale is actually effected by the owner himself.

"It is sufficient to entitle a broker to compensation that the sale is effected through his agency as a procuring cause." *Loyd v. Mathews*, 51 N. Y. 124.

The instruction, when applied to the facts in this case, as appellant contended the jury should find them, was equivalent to telling the jury to find for the defendant.

Appellant did not claim that he effected the sale of the property, but that he brought the parties together, and that while this property was still on his books a sale of it was negotiated between the parties for the same price that he held the property at.

Appellant was entitled to have the jury pass on the facts under correct instructions. For the error indicated the judgment will be reversed and the case remanded.

Reversed and remanded.

HENRY EGGERS

v.

SETH F. HANCHETT, FOR USE, ETC.

Replevin—Action on Bond—Damages—Whether Excessive.

In an action on a replevin bond, this court affirms the judgment of the court below, the evidence as to value being conflicting and the jury having been properly instructed.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. A. B. BALDWIN, for appellant.

Mr. C. M. HARDY, for appellee.

GARY, J. Debt on replevin bond. The only complaint here is that the damages awarded by the jury were excessive, and the court erred in not granting a new trial, asked for that reason.

The property consisted of a multitude of articles of household furniture, in various stages of "wear and tear," and it is impossible for the court, by any review of the testimony, intelligently to fix a value upon it. The jury were correctly instructed that "market value" was the rule, yet it is quite probable they deemed that inadequate compensation to a householder wrongfully deprived of her furniture.

There was conflicting evidence as to the value, and the verdict of the jury is, under ordinary circumstances, conclusive.

Judgment affirmed.

SARAH ROSENTHAL

V.

M. C. BOAS ET AL.

Injunctions—Dissolution—Damages—Rent—Solicitor's Fees.

1. Upon the dissolution of an injunction restraining the prosecution of certain suits before a justice to recover rent, it is improper to assess as damages the amount of rent involved in such suits, unless it appears from the evidence that such rent became lost by reason of the injunction.

2. Upon the dissolution of an injunction the opinion of an attorney as to the reasonable value of his services, is an insufficient basis for an allowance for solicitor's fees. Only the usual and customary fee paid, or for the payment of which the defendant has become liable, should be allowed.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. F. W. COOMBS, for appellant.

The court could not assess damages in favor of both defendants below upon proof of loss or injury to one only, and the record from beginning to end fails to show in anywise any loss as to M. C. Boas, under any circumstances.

It was error to assess damages for the rent under the lease. *Joslyn v. Dickerson*, 71 Ill. 25.

It was error to assess damages for attorney's fees, under the evidence, there being nothing to show that the attorney had either received or charged anything for his services. *Rees v. Peltzer*, 1 Ill. App. 315; *Jevne v. Osgood*, 57 Ill. 340; *Elder v. Sabin*, 66 Ill. 126.

It is essential to the validity of a decree in chancery that it should affirmatively appear from the record that it is supported by the proofs. *Kingery v. Berry*, 94 Ill. 515.

Mr. AUGUST MARX, for appellees.

MORAN, J. On a bill filed by appellant against appellees impleaded with H. B. Brayton, an injunction was issued restraining the defendants in the bill from proceeding with the prosecution of certain suits then commenced, and pending in justice court against the complainant in the bill.

Appellees demurred to the bill, and their demurrer was sustained and the injunction dissolved and the bill dismissed. Before the order dismissing the bill was entered, leave was given to file a suggestion of damages, and afterward evidence was heard and damages for the wrongful issuing of said injunction was assessed in favor of defendants in the bill, and against appellant, in the sum of \$264.

The evidence which was offered on the assessment of damages, and which is preserved in the record by a certificate of evidence, shows no proof whatever of any damages to any of the defendants in the bill, except Edmund C. Boas. The

decree for damages is therefore erroneous, as there is no evidence to support it. If the decree had been in favor of Edmund C. Boas alone, however, it would have to be reversed, as the damages were assessed on a wrong theory.

The injunction restrained the prosecution of certain suits which had been brought in justice court to collect rent alleged to be due to Edmund C. Boas from appellant. After the injunction was dissolved there was nothing whatever, so far as appears from the evidence, to prevent said Boas from proceeding with said suits to judgment or commencing new ones. The injunction only caused him delay and the payment of some \$4 as costs. It does not appear that he lost anything whatever by the delay, or that he could not just as successfully prosecute his suits against appellant after the injunction was dissolved as he could before it was issued. Such being the case, we are unable to perceive on what theory the amount of rent which it was sought to recover in the suits at law, can be assessed against appellant as damages sustained by said Boas by the wrongful issuing of the injunction. It was, in our opinion, clearly erroneous to include in the assessment of damages the rent claimed under the lease, and which the justice suits, restrained by the injunction, were brought to recover, there being no evidence to show that said rent became lost to the defendant Boas by reason of the issuing of the injunction. *Joslyn v. Dickerson*, 71 Ill. 25; *Elder v. Sabin*, 66 Ill. 126.

There is no sufficient evidence to support the allowance of \$50 as solicitor's fee against appellant.

It appears the injunction was dissolved because of the failure of appellant to comply with a rule entered by the court requiring her to file an additional injunction bond. The solicitor who appeared for appellees is the only witness as to the solicitor's fees, and his evidence is that he claims "that \$50 is a reasonable solicitor's fee for the service rendered in the dissolution of the injunction." There is no evidence showing that appellees paid to or had been charged \$50 by the solicitor. *Jevne v. Osgood*, 57 Ill. 340, is directly in point and controlling. It is there said, "The attorneys in this case only gave it as their opinion that the fee they named would be reasonable. Such proof is not proper and sufficient upon which to

Towne v. Fire Ass'n of Philadelphia.

base the decree. It should be, what has the defendant paid or become liable to pay, and is it the usual and customary fee paid for such services?"

For the errors indicated the decree for damages must be reversed and the case remanded to the Circuit Court.

Reversed and remanded.

27	433
70	148

LAURA C. TOWNE

v.

THE FIRE ASSOCIATION OF PHILADELPHIA.

Fire Insurance—Wearing Apparel—Removal from Ordinary Place of Deposit.

1. Where wearing apparel which is described in the policy of insurance as contained in a certain building, is destroyed several months after its removal from its ordinary place of deposit to a place where the owner is for the time being residing, it is not covered by the policy.

2. The ordinary use of wearing apparel in such cases does not include the use involved in long journeys, or protracted visits, during which it may be exposed to risks not contemplated by the insurer.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

The appellee, by its policy of insurance dated September 30, 1884, insured appellant to the amount of \$2,500, against loss by fire on household furniture, wearing apparel, etc., "contained in the two-story and basement French roof brick dwelling situated No. 1840 Calumet Avenue, Chicago." At the time the policy was issued, appellant was the owner of the building described, was residing and continued to reside there, until November 1, 1885, when John B. Carson took possession of the building (except a room and closet reserved by appellant

for storage purposes) under a lease from appellant for a year. The room and closet so reserved were used by appellant for storing her wearing apparel not in use, until part of it was removed to Ottawa, as hereinafter stated. Shortly after making the lease in question, she commenced to reside with her father, part of the time in Chicago and part of the time in Ottawa, in both of which places she had a residence. When she went to Ottawa in the fall of 1885, her family went with her. They remained there until February 4, 1886, and at that time her father's residence at that place was destroyed by fire, together with about \$2,500 worth of her wearing apparel, which she had taken from the reserved room and closet before going to Ottawa, and none of which had ever been returned to 1840 Calumet Avenue after she left Chicago for Ottawa.

This action was brought by appellant to recover from appellee the value of her wearing apparel so destroyed. There being no dispute as to the facts, the court below instructed the jury to find for the defendant. A verdict was rendered accordingly. Plaintiff moved for a new trial, the motion was overruled, and exception by plaintiff.

Judgment being entered on the verdict, the plaintiff appeals.

Messrs. JOHN GIBBONS and CHARLES E. TOWNE, for appellant.

It is a well settled principle of law that, where certain risks are expressly excepted, all risks not so excepted are covered by the policy. *Insurance Co. v. Transportation Co.*, 12 Wall. 194; *Smith v. Mech. & Trad. Ins. Co.*, 32 N. Y. 399.

Where there is any doubt in the conditions restricting the liability of the company, the construction should be adopted most beneficial to the promisee. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405.

The appellant in this case violated none of the express conditions of the policy under which she seeks to recover, and the law will not imply a condition that will defeat her right to recover. *Peterson v. The Miss. Valley Ins. Co.*, 24 Iowa, 494.

All of the property for which the appellant seeks to recover

Towne v. Fire Ass'n of Philadelphia.

was contained in the house 1840 Calumet avenue at the time the policy was issued. It was so described in the policy to identify the property, the same as personal property covered by a chattel mortgage is described as contained in a certain house. Yet, no one would contend that the property, if removed from the house described in the chattel mortgage, if it could be identified after removal, would cease to be covered by the mortgage.

The different States where this question has been raised have uniformly decided in favor of the appellant's right to recover. *Peterson v. The Miss. Valley Ins. Co.*, 24 Iowa, 494; *Mills v. Farmers Ins. Co.*, 37 Iowa, 400; *McCluer v. The Girard Fire and Marine Ins. Co.*, 43 Iowa, 349; *Longueville v. The Western Assurance Co.*, 51 Iowa, 553; *Noyes v. The Northwestern National Insurance Co.*, 64 Wis. 415; *Smith v. Merch. & Trad. Ins. Co.*, 32 N. Y. 399; *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

The risk was not materially increased by the use to which the appellant put her wearing apparel; the building in which it was destroyed was a detached brick and stone dwelling, with the nearest adjoining structure being some 300 feet distant, while there was a pond of water within a stone's throw of the rear of the building. The violation of the condition of the policy, that the appellee would not be liable if the risk was materially increased, is the only condition on which the appellee could properly expect to defeat a recovery under this policy. And the evidence shows that that condition was not violated, as the building in which the property was destroyed was more secure and better protected from fire than the building described in the policy, and that the use of the property was of the same character as its use when the policy was issued.

Messrs. WILLIAMS & THOMPSON, for appellee.

"A policy is inoperative except as to goods *kept in the place designated in the policy.*" 1 Wood Fire Ins. (2d) 113.

"A policy does not cover property unless it is in the place designated in the policy at the time of the loss, and this

rule is strictly enforced in favor of the insurer. * * * Place and location is of the essence of the risk, and the insurers can not be deprived of the privilege of judging for themselves how and where they will take the risk." 1 Wood Ins. 114, and cases cited; Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166; Harris v. Royal Can. Ins. Co., 53 Iowa, 236; Noyes v. N. W. Ins. Co., 64 Wis. 415.

"Briefly stated, the rule seems to be that the temporary removal of property, in pursuance of a use which is a 'certain necessary consequence' arising from the character of the property, without any change in the ordinary place of keeping, will be no defense to an action on the policy." Lyons v. Prov. Washington Ins. Co., 14 R. I. 110.

The whole class of exceptions covered by this statement is referred back to the presumed intention of the parties. Dillon, C. J., thus concisely states the principle in Peterson v. Miss. Valley Ins. Co., 24 Iowa, 494:

"In effecting this insurance and paying the company for the risk it assumed, it can not be supposed that the plaintiff was to be deprived, upon penalty of forfeiture of his policy, of the ordinary and beneficial use of the property insured."

GARNETT, P. J. The contention of appellant is, that the temporary removal of wearing apparel from its ordinary place of deposit, designated in a policy of insurance, for purposes reasonably incident to its use, does not suspend the risk assumed by the insurer. There are respectable authorities which sustain this proposition, as in Longueville v. The Western Assurance Company, 51 Iowa, 553, where the action was to recover the value of wearing apparel which was described in the policy as contained in a certain building in Dubnque, Iowa. At the time of the loss the insured was wearing the garments in the streets of Dubnque. The court held that it must be inferred that the parties to the contract intended the apparel to be used, and hence intended it to be used sometimes away from the dwelling.

The same principle was applied in Noyes v. N. W. National Ins. Co., 64 Wis. 415, where the policy described the wearing apparel insured as contained in a certain house. One of the

Towne v. Fire Ass'n of Philadelphia.

articles of the insured apparel was taken to a shop for repairs, and was there destroyed by fire on the same day it was received, before it could be repaired in the usual course of business. The court held such repairing was one of the necessary incidents to the use and enjoyment of the property, and must be presumed to have been in contemplation of the contracting parties. See also *Hawes v. Fire Association of Philadelphia*, 7 Atlantic Rep. 159; *May on Insurance*, 219.

The decision in *Annapolis & Elkridge R. R. Co. v. Balto. Fire Insurance Co.*, 32 Md. 37, is, perhaps, in conflict with the authorities above cited, but, if we adopt the rule of the cases relied on by appellant, it fails to reach her case. The removal of her wearing apparel was not such a temporary removal as the parties may be reasonably said to have had in view, nor was the place of ordinary deposit, described in the policy, continued after she commenced her visit in Ottawa. The ordinary use of the clothing in such cases does not include the using involved in long journeys, or protracted visits, during which the goods may be exposed to risks that the insurer would not have been disposed to incur. It would be unreasonable to infer any intention of that kind.

That the locality and the surroundings of insured property are always considered material by insurers, in accepting and rejecting applications for insurance, is a matter of common information, to which courts can not be indifferent in the decision of questions of this character. Risks on wearing apparel commonly kept in a building of safe construction might be taken at a low premium; in another less safe, the premium would be higher, and in still another, the risk declined. Certainly, it can not be supposed that a risk on such property, taken on ordinary terms, the place of deposit being described, attended by no circumstances raising an inference that unusual hazards were to be encountered, gives the insurer a discretion in the use of the property, which is not limited, either as to time or distance of removal from the place of deposit so designated.

The treatment of the case by the Superior Court was correct, and the judgment is affirmed. *Judgment affirmed.*

GARY, J., took no part in the decision of this case.

27	438
44	344
27	438
46	386
27	438
54	551
27	438
61	266

CHICAGO & NORTH-WESTERN RAILWAY COMPANY

V.

ANNIE DUNLEAVY, ADM'X.

Railroads—Action to Recover Damages for Causing Death—Viaduct—Repairs—Instructions—Rules—Questions for Jury—Requests for Special Findings—"Material" Questions.

1. In an action against a railroad company to recover damages for causing the death of a workman while he was engaged in repairing a viaduct over the defendant's track, it is *held*: That certain instructions were properly refused; and that the defendant had no right to run its trains at any rate of speed, at the point and time in question, without warning to those rightfully engaged in repairing said viaduct.

2. It is for the jury to say what conduct, or what acts, constitute care or its opposite. Therefore, answers to requests for special findings as to special acts without finding as to the ultimate facts of care or negligence, are merely surplusage.

3. Requests for special findings which require the jury to answer merely as to acts or omissions which may or may not, in their opinion, be evidence of care or negligence, and from their answers to which, either way, the court can not say as matter of law whether care or negligence is the result, are not material within the meaning of the statute.

4. It is the sole province of the jury to determine the weight of evidence and to consider conflicting evidence, without assistance from the court.

5. It is proper to refuse an instruction to the effect that positive evidence as to the occurrence of a fact is entitled to greater weight than negative evidence regarding it.

6. It is proper to refuse an instruction which, in effect, tells the jury to believe the witnesses for one party and to disbelieve those of the other party to the case on trial.

7. An instruction touching an irrelevant matter should be refused.

8. It is proper to refuse an instruction which correctly states a rule of law applicable to the case, which finds appropriate expression in other instructions given.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the
HON. JOHN P. ALTGELD, Judge, presiding.

MESSRS. W. B. KEEP and W. C. GOUDX, for appellant.

Messrs. M. L. KNIGHT and JOSEPH H. KENNARD, JR., for appellee.

GARY, J. This is an action under the statute for causing the death of John Dunleavy. On the 26th of July, 1886, he, with others employed by the city of Chicago, were engaged, as they had been the day before, in cleaning and painting the iron columns supporting the viaduct by which Blue Island avenue crosses the tracks of appellants. A west-bound freight train of appellants struck and killed Dunleavy a little after half past nine o'clock of that morning.

There is the usual conflict of testimony as to the speed of the train and signals by bell or whistle, but, as the evidence in this case stands, it is sufficient to say that it made a case for the jury to decide, which they did, according to established usage.

Appellants asked the court to require the jury to find:

"1. What precaution did the deceased take to inform himself of the approach of the train which caused the injury?"

"4. Did the deceased look to ascertain if the train in question was approaching?"

"5. Did the deceased listen to ascertain if the said train was approaching?"

The first question the court declined to put to the jury, and they answered, "Don't know," as to the other two. The jury were also asked:

"2. If the deceased had looked before the accident could he have discovered the approach of the train in time to have avoided the accident?"

The answer was "Yes."

"3. If the deceased had listened before the approach of said train could he have discovered the approach of said train in time to have avoided the accident?"

And they answered: "If he had concentrated his attention in that particular direction, yes." As to the first question, it is apparent that if it had been put the jury must have answered it, as they did 4 and 5, and that because the man who alone had knowledge upon the subject is dead. But the an-

swers to 2 and 3 show what, in the opinion of the jury, he might have seen or heard; and so the question is raised whether, under any circumstances, by running at great speed and giving no signal, a railway may become liable for injury to one rightfully engaged at the place of injury, the railway having notice that the work in which he was engaged was being done, and the party injured taking no precaution by which he would be warned of the approach of the train. Whatever may be said as to what would be proper care on the part of the party injured, and of his duty in that regard, the doctrine of comparative negligence, as established in this State, makes that a question for the jury, under appropriate instructions. If it shall ever become a question before a court having jurisdiction to decide it, whether a statute which requires a jury to do what is impossible, is valid and not inconsistent with the constitutional right of trial by jury, then that court will probably decide the question. At common law the jury have the right to find a general verdict, and can not be required to give any reason for it. 3 Bl. Com. 378. And whether legislation which, in effect, requires them to give reasons, and which not only requires unanimity in the result, but in the process by which that result is reached, is consistent with the right guaranteed by the constitution, may deserve consideration.

It is not for the court, but for the jury, to say what conduct or what acts do or do not constitute care or its opposite. Answers, therefore, as to specific acts, without finding as to the ultimate facts of care or negligence, are merely surplusage, and no question which require a jury to answer merely as to acts or omissions which may or may not, in the opinion of a jury, be evidence of care or negligence, but from the answers to which, either way, a court can not say, as a matter of law, whether care or negligence is the result, can be in the sense in which the word is used in the statute, "material."

The action of the court as to these questions was not erroneous, either in refusing to submit to the jury the first question, or in not regarding the answers to the second and third as inconsistent with a general verdict for the plaintiff, or in accepting the answers to the fourth and fifth as sufficient.

The refusal of the court to give the four following instructions, is assigned as error.

"No. 15. The jury are instructed, as matter of law applicable to this case, that positive evidence as to the occurrence of a fact is entitled to more weight than negative evidence in relation to it, and that the testimony of witnesses who testify positively that the bell and whistle of the engine of the train causing the injury to the deceased was rung and blown is entitled to more weight than the testimony of persons who testify that they did not hear it."

"No. 17. The jury are instructed, as matter of law, that if you believe from the evidence in this case that both the deceased and the agents and servants of the defendant were guilty of gross negligence, contributing to the injury complained of in this case, your verdict should be for the defendant."

"No. 20. The jury are instructed, as a matter of law applicable to this case, that, under the pleadings in this case, the defendant, the railway company, had a right to run its engine and train at the time and place of the injury to deceased at any rate of speed consistent with the safety of its employes and the property on its train."

"No. 21. The jury are instructed, as a matter of law, that the defendant in this case was only bound to keep and maintain its tracks in such location and condition as to viaducts or columns which supported the same, as might be consistent with the safety of its own employes and of passengers upon its trains."

"It is the sole province of the jury to determine the weight that evidence should receive, and equally so to consider conflicting evidence, without any assistance from the court." *Frizell v. Cole*, 42 Ill. 362.

It is not an infringement of this rule for the court to instruct the jury as to legal principles relating to the credibility of witnesses, but the 15th instruction went beyond this, and would have told the jury that "the testimony of witnesses who testify positively that the bell and whistle of the engine of the train in question were rung and blown" was entitled to more weight, etc., without regard to motive or interest of the wit-

nesses, intelligence or attention at the time. It went further than to announce a rule and, in effect, told the jury to believe the witnesses for the defendant in the case on trial. *T. W. & W. Ry. Co. v. Brooks*, 81 Ill. 245.

The 17th instruction is correct and should have been given if it had been the only one covering the point. But if the court has in one instruction given the same, or more favorable to the party asking it, rule for the jury to be guided by, it is not necessary to repeat it. *Scott v. Delany*, 87 Ill. 146, is enough to cite, but the cases are many.

In the 4th instruction given for appellant, the jury were told that if the appellee had failed to prove, by a preponderance of the evidence, that the deceased was exercising ordinary care and prudence for his safety at the time of the accident, she could not recover. In the 6th, that if by the exercise of the highest degree of vigilance and care, by the deceased, the injury might have been avoided, she could not recover; and the same principle is in many forms stated in others of appellant's instructions, as well as in those of the appellee.

The 20th and 21st ignore all duty on the part of the appellant to have any regard for the welfare of the general public. It is true, the place of the accident was not what is commonly known as a street crossing. It had been at one time, but the street had been carried over the track by a viaduct, after the track was laid, if notice may be taken of the common usage that a viaduct is not built until after a crossing has become very dangerous. The structure was subject to decay. The necessity for repairs would occasionally come. The repairs were actually in progress, of which there was evidence from which the jury might find that the appellants had notice, as the men were at the same work the day before.

The statement that the appellants had the right to run at any rate of speed, etc., implies that there was no duty to warn anybody of the approach of the train—if they were in the exercise of their unqualified right, everybody must keep out of their way. It is not a statement that they had a right to run, by warning persons rightfully in a place where great speed of the train would put them in peril, but an absolute,

Wistar v. Hertling.

unqualified and untrammelled right. The 21st probably was not intended to mean what it says, "that the defendant in this case was only bound to keep and maintain its tracks."

As to the tracks, it may be conceded that the instruction does state the full duty of the appellants, but that was not the full duty of the appellants as to the whole subject-matter of the suit. If they were only bound as to this one thing, there was no other obligation resting upon them. Besides, there was no question made in the case as to location of tracks, and the instruction was irrelevant to the controversy. These instructions were properly refused.

There is no error in the record and the judgment is affirmed.

Judgment affirmed.

ISAAC J. WISTAR

v.

WILLIAM A. HERTING ET AL.

27	443
76	608

Real Property—Title—Bill to Remove Cloud—Decree—Absence of Evidence or Finding to Sustain—Sale—Contract—Payment—Offer to Return—Liens—Authority of Clerk to Pay Incumbrances.

1. To sustain a decree upon appeal, the evidence must be preserved in the record, or facts found from the evidence sufficient to warrant the relief granted, must be recited in the decree.

2. Upon a bill to remove a cloud from the title to certain real estate caused by a contract of sale, it is *held*: That the decree should have required to be kept good an offer contained in the bill to return a payment on the purchase price to the vendee; and that it was improper to give the clerk of the court authority to decide what were the existing liens and incumbrances, and to pay the same, if the vendee should avail himself of the provision of the decree directing him to pay the balance of the purchase money to the clerk and take a conveyance of the premises to himself.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. OSBORNE BROTHERS & BURGETT, for appellant.

MR. JOHN C. PATTERSON, for appellee.

GARNETT, P. J. The bill filed in this case by William A. Herting against Julia A. Herting and the appellant, prays for the removal of a cloud upon certain premises, caused by a contract of sale made between William A. and Julia A. Herting as vendors and appellant as vendee.

The answer of Wistar presented material issues of fact, and replication thereto was filed. A decree was entered, directing that Wistar, within thirty days, should fully perform the contract on his part and pay to the clerk of the court the purchase price of the property, and that thereupon the vendors should convey the premises to Wistar; that the clerk pay the incumbrances out of such fund, and hold the balance subject to the order of court; and that, in default of such payment by Wistar, the contract be set aside as a cloud on the title to the premises, and declared of no effect as against the vendors and their title.

The burden of proof was on the complainant. He should have proved the case made by his bill. The record wholly fails to show any evidence was heard. To sustain a decree, the evidence must be presented in a certificate of evidence, depositions or master's report, or the facts found from the evidence, sufficient to warrant the relief granted, must be recited in the decree. Citations of authority on this point would be superfluous labor.

The bill admitted the payment by Wistar of \$2,500 by certified check, to be applied on the purchase price, and offered to return the same. The decree should at least have required that offer to be kept good, but, for some reason not apparent to us, it is silent on that subject.

Another error alleged by appellant, is the authority given the clerk of the Superior Court to decide what were the existing liens and incumbrances, and then to pay them off. If Wistar wished to avail himself of that part of the decree directing payment of the money by, and conveyance of the

Hews v. Wall.

premises to him, he could not have done so with safety, nor would he have received what his contract called for. He was entitled to a good and merchantable title by the terms of the contract, and that he could exact at the time the purchase money was paid. He could not be compelled to accept the judgment of the clerk as to what was or what was not a lien, nor should he have been required to await his action in paying off the liens.

If this feature of the decree (substantially a decree for specific performance) would be warranted by the pleadings, and evidence had been introduced to support the bill, yet we are clearly of opinion that appellant could not be ordered to accept the legal services of the clerk in protecting his interests in this weighty transaction.

The decree of the Superior Court is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CHARLES D. HEWS

v.

WILLIAM WALL.

Replevin—Conversion—Ownership—Defective Verdict.

In an action of replevin, a judgment in trover for the conversion of part of the goods in question is not supported by a verdict which fails to find the ownership of the property.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. GEORGE SPARLING, for appellant.

No counsel appeared for appellee.

GARNETT, P. J. This action of replevin was commenced by appellee against appellant and one James Fillio before a justice of the peace. Part only of the goods sued for were recovered under the writ. The justice found property in the plaintiff in the goods recovered, and rendered judgment in trover for conversion of the rest. Hews alone perfected an appeal to the Circuit Court, and filed therein, on May 8, 1886, his appeal bond. No summons from that court to Fillio was issued, nor was his appearance ever filed there, but Wall entered his appearance July 2, 1887. In that state of the record (the transcript of the justice having been duly filed) the cause was called for trial, and verdict rendered finding that the goods taken by the constable were the property of the plaintiff, and finding the defendants guilty of the conversion of other property, not found by the officer, and the value thereof to be \$150. Judgment on the verdict was rendered by the court against Hews, impleaded with Fillio. The verdict and judgment did not dispose of the issues in the case. Hews is required to pay \$150 to Wall for property whose ownership is not found by the verdict. This court decided such a verdict and judgment to be erroneous in *Nelson v. Bowen*, 15 Ill. App. 477.

The judgment of the Circuit Court is reversed and remanded.

Reversed and remanded.

27 446
44 440

EDWIN T. HUNT

v.

CHARLES W. BALDWIN.

Practice—Appeal—Dismissal—Section 67, Practice Act.

Complaint of irregularity by the Circuit Court in dismissing an appeal from a justice for want of prosecution, is too late when made at a subsequent term.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. BOOTH & BOOTH, for appellant.

MR. PAYNE FITZ, for appellee.

GARY, J. At the September term, 1887, of the Circuit Court, this case being then pending there on appeal taken by the appellant from the judgment of a justice of the peace, by filing the appeal bond with the justice, that appeal was dismissed for want of prosecution.

At the following December term the appellant moved the court to set aside the order dismissing the appeal and re-instate the cause, which motion the court denied. This appeal is from the order denying the motion. The appellant claims that the order at the September term was wrong, because the appellee had not, before that order was made, entered any appearance in the cause, or paid any appearance fee, and cited Sec. 68, Chap. 79, R. S.

"In case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment ten days before the commencement of the term of the court to which the appeal is taken, the appearance of the appellee may be entered in writing and filed among the papers in the case; and if so entered ten days before the first day of the term of the court, the case shall stand for trial at that term."

In *Smith v. Wilson*, 26 Ill. 136, the Supreme Court held, that where the suit, pending on appeal from a justice, was irregularly dismissed for want of prosecution, the court had no authority at the next term to re-instate it.

To take the case out of the rule established by the class of cases of which *Smith v. Wilson* is one, appellant relies on Sec. 67 of the Practice Act.

"The writ of error *coram nobis* is hereby abolished, and all errors in fact committed in the proceedings of any court of

record, and which by the common law could have been corrected by said writ, may be corrected in the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

But if there was error in the action of the court at the September term (upon which point no opinion is expressed), it was error in law, deciding wrong on the facts appearing by the record and proceedings in the cause, and not in ignorance "of matters of fact, not appearing on the face of the record, which, if true, prove the judgment to have been erroneous." 2 Tidd's Prac. 1168.

In *Fix v. Quinn*, 75 Ill. 232, it is decided that complaint of irregularity in disposing of an appeal suit in the Circuit Court (though in that case it was held that the complaint was not well founded) comes too late at a subsequent term, and that the section of the statute last quoted has no application to the case. See also *Kilholtz v. Wolff*, 8 Ill. App. 371, as to what is error in fact.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

J. B. FERGUS ET AL.

V.

E. C. LOHMAN.

Practice—Appeal by Part of Defendants from Justice's Judgment—
Sec. 70, Chap. 79, R. S.

1. An appeal by part of the defendants from a justice's judgment, when the appeal is perfected by filing a bond with the clerk of the Circuit Court, does not stand for trial until the other defendants have been brought in, or have entered their appearance.

2. It is improper, in such a case, to dismiss the appeal for want of prosecution, until all the defendants have thus become subject to the jurisdiction of the court.

[Opinion filed December 7, 1888.]

Fergus v. Lohman.

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. JOHN D. ADAIR, for appellants.

No counsel appeared for appellee.

GARNETT, P. J. Appellee sued J. B., George H., Scott, Robert and Robert C. Fergus before a justice of the peace, judgment being rendered against all the defendants. All except Robert C. appealed to the Circuit Court, filing their bond with the clerk of that court January 21, 1886. Lohman's appearance was entered in the Circuit Court May 12, 1886, and at the same time the justice's transcript was filed. No summons was issued to bring in Robert C. Fergus, nor was his appearance ever entered in the Circuit Court. On September 20, 1887, the cause was reached on the call of the calendar, and none of the defendants being in court in person or by attorney, the appeal was dismissed for want of prosecution, and judgments for costs rendered against the appealing defendants. It is now the settled rule that an appeal by part of the defendants from a justice's judgment to the Circuit Court, when the appeal is perfected by filing bond with the clerk, does not stand for trial until the defendants not appealing have entered their appearance, or been brought into court in the manner described in Sec. 70, Chap. 79, R. S. *Steinborn v. Thomas*, 8 Ill. App. 515; *Hooper et al. v. Smith*, 19 Ill. 53; *Stewart et al. v. Peters*, 33 Ill. 384.

Until Robert C. Fergus was before the court, the plaintiff could not have been forced to trial, and it is a general rule of practice that a party can not force his adversary to act until he himself is in a condition to be forced to proceed. *Hooper v. Smith*, *supra*; *Lehman v. Freeman*, 86 Ill. 208.

Had the four appealing defendants appeared and proceeded to trial in the Circuit Court, without objection, a different question might have been presented. *Callaghan v. Meyers*, 89 Ill. 566.

The order dismissing the appeal and ordering costs against appellants is erroneous.

Reversed and remanded.

THE CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

v.

SAMUEL MASON.

Railroads—Action for Damages for Causing Death of Child—Instructions—Comparative Negligence.

1. An instruction stating the rule as to comparative negligence is defective, unless it requires the jury to compare the negligence of the respective parties and from such comparison determine whether the one is slight and the other gross.

2. Where the evidence is conflicting and the case one which appeals strongly to the sympathy of the jury, the instructions must be accurate and clear.

3. In an action by the father against a railroad company to recover damages for causing the death of a child of tender years, it is *held*: That the instructions for the plaintiff improperly ignored the question of the father's negligence; and that this error was not corrected by the instructions given for the defendant.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Carroll County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. JAMES SHAW, for appellant.

Mr. J. M. HUNTER, for appellee.

MORAN, J. On the morning of Sunday, November 7, A. D. 1886, Eva Mason, a child between six and seven years old, was run over by a train of cars and killed upon the track of appellant, in the village of Thompson, in Carroll County.

At the time of the accident Eva was on her way to Sunday school in company with her elder sister, who was about eleven years of age. Appellant's track runs north and south through the village, and parallel with it, and about 160 feet west of it is the track of the C. B. & N. R. R., which runs through one

of the fields of appellee, the father and administrator of the child Eva.

Appellee's house is about forty rods from the point on appellant's track where the accident occurred. The church to which the children were going to attend Sunday school is located southeast from appellee's house and distant about 375 feet from the place of the accident. The line which the children took in crossing appellant's track ran in a southeasterly direction, and followed what seems to have been a cow path, which these and other children were accustomed to travel in going to and fro, and it crossed the tracks of appellant at a point where there was, on the west side, a considerable embankment, down which the path led, and where there were located switches, frogs and the rails of three tracks. It was not a laid-out street or road, or regular crossing, and there was another path or sidewalk running from appellee's premises down the west side of the railroads to an open street of the village which leads over to the church, and which route was sometimes traveled by the Mason children, but not as frequently as was the shorter course by the cow path. The train which struck and killed the child was known as the "Flying Dutchman," and was running on that occasion as a wild train, that is to say, not on any regular or schedule time, and it passed through Thompson somewhat later than its usual time, and did not have occasion to, and did not stop at the depot in the village.

Appellee's evidence tended to show that as the children were crossing the track the foot of little Eva was caught in some manner in the track, and while she was, with the aid of her sister, trying to extricate it, the train came along at a high rate of speed and killed her; that the point at which she became fast in the track was in plain view of the servants of appellant in charge of the train for a distance of some thirteen hundred feet, as the train approached, and it is contended by appellee that the train was run through the village at what was, under the circumstances, a wild and reckless rate of speed, and that the servants of appellants could, by the exercise of ordinary care and caution, have seen the child on

the track in time to have stopped the train before running over her.

Appellant's evidence tended to prove that the train was running at a moderate rate of speed, not to exceed eighteen miles an hour; that the engineer and fireman were in their places keeping a look-out ahead; that the bell on the engine was ringing; that the children when first observed were on the embankment with no apparent intention of trying to cross before the train; that, when it had arrived within from seventy-five to one hundred feet from them, they suddenly started and went upon the track; that the older one got almost over and then turned and went back; that the engineer on seeing her at once blew the whistle and applied the air brakes; that the elder girl just escaped being struck; that the smaller one seemed to get confused and was struck just on the west rail and was killed.

Appellant denies that the child's foot was caught in the track, or that she fell before she was struck by the train. The evidence shows that appellee knew that the children were going to cross the track at that point; that he saw them start for Sunday school, and seeing a freight train coming from the north on the C., B. & N. road, followed the children some ways toward the gate opening from his premises, and called to them that they would have time to cross in front of this train, which they did and then went on toward appellant's track. That the father knew of the location of the switches and side tracks at the point where the path crossed appellant's line, and well understood the danger and inconvenience of the crossing, and it is contended by appellant that he was guilty of such negligence in permitting the children to go upon the tracks at such a place and under such circumstances as precludes his right to recover in this case.

It is also contended by appellant that the men in charge of the train were guilty of no negligence; that they did all in their power to stop the train as soon as the children were seen to be upon the track, but they went on so close to the approaching train that it was impossible to arrest its motion so as to prevent the injury.

The evidence introduced on the trial was voluminous and in many points conflicting, the case a most sad one, appealing strongly to the sympathy of a jury as it does to the sympathy of the court, and therefore it belongs to that class of cases where it is the duty of a reviewing court to set aside the verdict, if it appears from the record that an error of law was committed by the trial court injurious to the party against whom the verdict stands.

The appellee's right to recover depended upon his proving to the jury that appellant's servants were guilty of negligence which caused the injury, and that there was legally chargeable against appellee or his decedent no lack of ordinary care. The question of comparative negligence was involved, and the doctrine thereon was invoked by appellee in the ninth instruction given to the jury by the trial court. Said instruction as given, is as follows:

"The court instructs the jury that the question of the liability of the defendant does not depend wholly upon the absence of all negligence upon the part of the deceased, Eva Mason, but it depends upon the relative degree of care, or want of care, manifested by both parties as shown by the evidence. And in this case, although the jury may believe from the evidence that the deceased was not wholly without fault, yet, if they further believe from the evidence that the defendant was guilty of gross negligence upon the occasion referred to, and that the injury complained of was occasioned by such gross negligence, and further, that the negligence of the plaintiff was but slight, then the jury should find the defendant guilty and assess the plaintiff's damages at such sum as they may believe under the evidence he has sustained."

It will be observed that the instruction omits the substantial element of the doctrine of comparative negligence that requires the jury to compare the negligence of the respective parties, and from such comparison to determine whether the one is slight and the other gross. In C. & E. I. R. R. Co. v. O'Connor, 13 Ill. App. 65, this court said: "A plaintiff, though guilty of negligence contributing to the injury complained of, may still recover if his negligence is but slight,

and that of the defendant gross in comparison therewith. In stating the rule to the jury in an instruction, no material element of this formula can be properly omitted. Where a plaintiff is guilty of contributory negligence, before he can recover, it must appear, not only that his negligence is slight and that of the defendant gross, but that they are so when compared with each other. The element of comparison is as indispensable to a proper statement of the rule as are the degrees of the negligence of the respective parties;" and in *E. St. L., B. & P. Co. v. Hightower*, 92 Ill. 139, the rule is thus stated by the Supreme Court: "Where the plaintiff is guilty of contributory negligence, he can not recover unless it appears that his negligence was slight and that of the defendant gross in comparison with each other. Both terms must be stated to enable the jury to obtain a correct apprehension of the rule." See also *Moody v. Paterson*, 11 Ill. App. 180; *Quinn v. Donovan*, 85 Ill. 194; *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206.

While it is not, under the rule now established, indispensable that the doctrine of comparative negligence be stated in the plaintiff's instructions, yet if an attempt is made to state the doctrine, it must be stated correctly. *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 596. It is apparent that the instruction given was erroneous, and we do not find that the error was cured by any other instruction, if indeed it could be cured in such a case as is shown by the record.

We are of opinion that the court further erred in a matter more injurious to appellant than that already referred to, in ignoring, in the instruction given to the jury at the request of plaintiff, the question of the negligence of the father of the child. The court, in a number of instructions given at the request of the plaintiff, confined the jury, in their consideration of the care and caution that was required from the plaintiff, to that degree of care that could reasonably be expected to be found in a child of the age and mental capacity of said Eva Mason, and told the jury that if she exercised such care, then the plaintiff was entitled to recover. There was evidence before the jury that the father of the child was aware of the

dangerous character of the crossing, and that he knew that the children were about to cross at the point where the accident happened on the occasion when the child was killed—in fact, he had sent the children on their way.

The question of the father's negligence, or want of ordinary care, was in the case, and necessary to be passed on by the jury, and before the plaintiff could be entitled to recover it was as essential that the father should have been found to have exercised ordinary care, as it was that the child should be found to have exercised such care as ought to have been expected from one of her years. To leave out of the instructions, which purported to state to the jury all the elements necessary to plaintiff's right of recovery, the requirement of ordinary care on the part of the father, was as fatal as it would be to leave out the requirement of ordinary care on the part of the child. Here the action is not brought by the child, but by the father as administrator, for the benefit of the next of kin. *Hund v. Grier*, 72 Ill. 393; *T. W. & W. Ry. Co. v. Grable*, 88 Ill. 441.

The plaintiff's instructions should have contained the hypothesis that the appellee was free from negligence, or that, if he was not, his negligence was slight, and that of appellant gross in comparison therewith.

The fact that the court gave instructions on the part of the defendant which required that they should find appellee was free from negligence in order to entitle plaintiff to recover, does not cure the error in the plaintiff's instructions. *Hoge v. The People*, 117 Ill. 35. The jury were left to choose between conflicting instructions, and it is impossible for the court to determine which rule they followed.

Because of the errors indicated, the judgment must be reversed and the case remanded.

Reversed and remanded.

ALBERT A. SPEAR ET AL.

V.

EDWARD W. JOYCE.

Attachment—Clause 6, Sec. 1, Chap. 11, R. S.—Only Intention of Grantor, Material—Instruction.

1. Upon the trial of an attachment issue, under Clause 6, Sec. 1, Chap. 11, R. S., it need not appear that the grantee participated in the fraudulent intent of the grantor to hinder or delay his creditors.

2. Where only the interests of the grantor are involved, only his intention is material.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. EDWIN BURRITT SMITH and JOHN BARTON PAYNE, for appellants.

The conveyance complained of is a chattel mortgage executed by the defendant when insolvent, May 14, 1886, conveying his entire stock of goods, wagons, harness and one horse, being his entire unincumbered property, except household furniture. This mortgage purports to have been given to secure two notes payable to Emma Molter, the mortgagee, one for \$375 and the other for \$538, due ten and twenty days after date, respectively. The alleged consideration for the note for \$375 was an indebtedness of \$261 to the Molter Furniture Company, the firm of which said Emma Molter was a member, and a fee of \$100 to the attorneys who acted for the parties, for services having some connection with the conveyance. The alleged consideration for the note for \$538 consisted of all the claims of the other creditors of said Joyce, except the claim of the plaintiffs for \$569.06. The claims of said creditors so intended to be secured (to them) by said conveyance amounted to but \$445.90, or \$92.10 less than the face of said note. The mortgagee took possession of the mortgaged property on the day after the mortgage was given, closed the store of the defendant and advertised the stock and other

Spear v. Joyce.

property for sale. Prior to the sale appellants brought this proceeding, and had Emma Molter and said Emma and Wilhelmina Molter, as co-partners, served as garnishees.

The defendant pleaded only to the attachment writ, and the only issue presented was whether said conveyance was made to hinder or delay his creditors. The title of Emma Molter, the mortgagee, was not in issue. The question was simply whether the conveyance made by the defendant Joyce was made with the intent to defraud. Emma Molter was not a party, and no issue was made as to the *bona fides* of her debt. The instruction in question was highly improper, as it required the jury to find that the attachment was improperly brought, unless both the defendant and the mortgagee participated in the intent to hinder and delay the plaintiffs. *Pettingill v. Drake*, 14 Ill. App. 424, 427; *Enders v. Richards*, 33 Mo. 598, 602; *Waples on Attachment*, 57, and cases cited.

WEIGLEY, BULKLEY & GRAY, for appellee.

It is insisted that the sixth instruction was erroneous because the title of Emma Molter was not in issue, and that the question was simply whether Joyce made the mortgage with intent to defraud. The issue is much broader than that. The allegation in the affidavit of attachment is that Joyce "fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors." The issue goes to the conveyance itself. Was it a fraudulent conveyance? To make the conveyance fraudulent as to creditors, both Joyce and Emma Molter must have participated in the fraudulent intent. *Herkelrath v. Stookey*, 63 Ill. 486; *Bowden v. Bowden*, 75 Ill. 143; *Myers v. Kinzie*, 26 Ill. 36; *Ewing v. Runkle*, 20 Ill. 449.

Mr. Justice Breese, in the case of *Bowden v. Bowden*, *supra*, says: "To impeach the sale of personal property it is necessary to show that both the vendor and purchaser designed to delay creditors."

Whatever may have been the moral intent of Joyce in making this mortgage, his legal intent can only be established by his acts. The moral intent is something with which we

have nothing to do—something intangible or incapable of being measured or determined. His legal intent we can determine from his acts and the result of them. If the conveyance that he made was a legal conveyance, *bona fide* in law, then the intent with which he made that conveyance, legally speaking, must have been *bona fide*. And if, on the other hand, the conveyance was fraudulent in law, then, legally speaking, it was made with a fraudulent intent. In other words, the intent with which he made it can only be determined by the result, to wit, the quality of the conveyance. That being the case, an instruction, to be correct, must inform the jury what constitutes a fraudulent conveyance, and that is just what the instruction in question did.

GARY, J. This was a suit by attachment, in which the affidavit, traversed by the appellee, alleged that the appellee fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

The sixth instruction of the appellee was that the appellants, in order to sustain the issue, must prove by a preponderance of the evidence that the alleged fraudulent conveyance was given with the intent on the part of both the appellee and the grantee to hinder, delay and defraud the creditors of the appellee. This is contrary to the doctrine of *Pettingill v. Drake*, 14 Ill. App. 424, and *Enders v. Richards*, 33 Mo. 598.

Appellee very ingeniously argues that he could not fraudulently convey, except by a fraudulent conveyance, and that no conveyance is fraudulent unless the grantee participates in the fraud; citing *Herkelrath v. Stookey*, 63 Ill. 486; *Bowden v. Bowden*, 75 Ill. 143; *Myers v. Kinzie*, 26 Ill. 36; *Ewing v. Runkel*, 20 Ill. 449. These cases unquestionably support the latter branch of his proposition, but they are applicable only where the title of the grantee is attacked. Where only the interests of the grantor are involved, then only his intention is material.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Touhy v. Daly.

PATRICK L. TOUHY ET AL.

v.

HENRY P. DALY.

*Real Property—Sale—Action for Commissions—Husband and Wife—
Joint Liability—General Issue—Burden of Proof—Instructions.*

27	459
46	380
46	455
46	521
37	459
70	228

In an action to charge two defendants, husband and wife, jointly for commissions on the sale of certain real estate, it is *held*: That the plea of the general issue relieved the plaintiff from the burden of proving the joint liability of the defendants in the first instance; and that the evidence on the part of the defendants fails to disprove joint liability.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. C. H. & C. B. WOOD, for appellants.

There is nothing to connect Catharine C. Touhy in any way with any agreement to pay commissions to appellee.

The only count in the declaration touching the case is the common count for services against the defendants jointly.

Of course, it is settled law that in actions *ex contractu*, the plaintiff, in order to recover, must establish a cause of action against all the defendants. *Rosenberg v. Barrett*, 2 Ill. App. 386; *Davison v. Hill*, 1 Id. 70; *Garland v. Pecney*, 1 Id. 108.

Judgment against two on a contract, without proof as to one, will be reversed. *C., B. & Q. R. R. Co. v. Coleman*, 18 Ill. 297; *Jansen v. Varnum*, 89 Ill. 100.

This contract was made by Mr. Touhy. It binds him by its terms, but it does not undertake or even purport to bind Mrs. Touhy, who was the owner of the property, to do anything, not even to sell.

As it is not the contract of Mrs. Touhy, it would seem almost superfluous to discuss the question whether Mr. Touhy was her agent, or whether the contract was ever ratified by

her. So far as any agency may be implied, however, it was distinctly repudiated by her as soon as the contract was brought to her attention.

Appellee does not claim that he ever made any contract with Mrs. Touhy in regard to a sale of the property or as to commissions. When he was distinctly notified that the contract was repudiated, he did not see Mrs. Touhy. What Mr. Touhy said about his authority is no evidence that he was her agent. *Whiteside v. Margarel*, 51 Ill. 507. And an agency by implication will not bind the principal if he repudiates it. *Bertholf v. Quinlan*, 68 Ill. 297.

Messrs. MASON, ENNIS & BATES, for appellee.

GARY, J. The ill-natured and vituperative brief on behalf of the appellee, excites suspicion that he is on the wrong side of this case; nevertheless, it is the duty of the court to examine it on its merits. His claim is for commissions upon a sale of real estate at Rogers Park, negotiated, as he alleges, as agent for appellants. They were husband and wife. The property was hers by inheritance.

The declaration contained the common count in assumpsit for work, and the only plea was the general issue. Under the plea the appellee was relieved from the burden of proving the joint liability of the appellants, but they were at liberty to disprove it. *Bensley et al. v. Brockway*, *ante*, p. 410, where this subject is considered at length.

That the sale was negotiated by appellee and consummated at a lawyer's office, where the parties to this suit and the purchaser were all present, clearly appears from the evidence. What papers were then executed is left, by the evidence, to inference. In the ordinary course of business there would have been a deed signed by both appellants, as the evidence shows that the purchase money was then paid. It also is clear that appellee was employed in the business by conversations between himself and the husband. The terms of that employment, as to what should be the commissions, are disputed, but the verdict, upon conflicting evidence, is final.

Touhy v. Daly.

The appellants insist that there was no joint liability, and argue the case as if the appellee was required to prove it, instead of the burden being upon them to disprove it, and procured an instruction to the jury that, "a case must be made out against both defendants, or else there can be no recovery against either," which was more than they were entitled to; for it was not necessary to a recovery that the proof should show a joint liability, but only that it should not show the contrary; yet if, on the whole case, it does appear that they were not jointly liable, the judgment must be reversed. *Davison v. Hill*, 1 Ill. App. 70; *Garland v. Peency*, 1 Ill. App. 108.

In addition to the fact that both appellants were present at, and, it is reasonable to infer, joined in, the consummation of the sale, the husband testifies:

"The negotiation for the sale of this sixteen acres commenced in this way: In the fore part of the year 1886, Mr. Daly's son came to the house one morning with a letter, saying that his father would like to see me on some business, and I went to see him that evening, but he was not at home. The following morning I got up rather early and went to Mr. Daly's house, and he asked me if the property was for sale; I said yes, and he asked me what were the terms. Well, I said we offered it at one time at not less than \$1,200, but I would go back and see, if he got the right sort of a person, if I could sell it to him for less. 'Well,' he says, 'let me know; I have a customer that wants to buy the property if it is reasonable.' 'Well, I don't think,' says I, 'that we would give it for less than \$1,200; that is the price it was offered at two years, and we had no offers since;' and then I spoke to my wife, and I said: 'We are carrying too much property, and perhaps it would be well to let it go at a reasonable figure,' and I thought that would be \$1,000 cash. I went to Mr. Daly afterward, and told him that Mrs. Touhy said it must be cash, \$1,000, but if you want anything out of it you will have to charge; she will not sell at less than \$1,000; you can sell it at \$1,100, \$1,200, as you please."

Again he says: "I own an equity in property in Rogers Park. I have what they call first equities." When the pur-

chase money was paid, it was first handed to the wife, who passed it to the husband, and he put it in his pocket. And she testifies: "I never told Mr. Daly anything myself about the thing. I don't remember whether I sent any word to Mr. Daly by my husband about this matter."

There was a preliminary contract in writing for the sale, executed by the husband as agent for the wife, June 6, 1886, and the consummation of the sale was July 20, 1886.

There was a good deal of evidence of her dissent to what her husband had done, and of great difficulty in inducing her to complete the sale, but she finally did it upon the original terms.

The whole case is consistent with the hypothesis that the appellants did, between themselves, regard the property which was the subject of the sale, as property in which they had a common interest, though the ownership was hers; that whatever was to be done about it, was the subject of mutual consultation, and when agreed upon, was to be done by him for their common benefit, on her behalf and his own. In this aspect of the case, he stood, with reference to her and the property, very much in the same relation that a partner occupies, except that he could not act independently. And if this hypothesis may be true consistently with the evidence, and being true, makes the appellants jointly liable, then, under the statute, it must be taken as true, because the burden was upon the appellants to prove the negative of joint liability. This view takes out of the case all questions except what was the bargain as to commissions, and, as before said, that the jury have settled.

The judgment will be affirmed.

Judgment affirmed.

Nix v. Whiteside.

CHARLES H. NIX
v.
LAVINA J. WHITESIDE.

Fraud—Action of Trespass—Conflict of Evidence.

Where there is a sharp conflict of evidence on material points in the case and no error of law intervenes, the verdict of the jury is conclusive.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. H. BOOTH and T. MORRISON, for appellant.

Messrs. RICHARD S. THOMPSON and GRANVILLE W. BROWNING, for appellee.

Per Curiam. This was an action of trespass on the case for alleged fraud and deceit on the part of appellant.

This case was tried by a jury and a verdict rendered against appellant, and he brings the record to this court, and in the briefs filed by his counsel no point of law upon the admission or rejection of evidence, or the giving or refusing instructions, is made, but the discussion is wholly confined to the question of fact. We have examined the record and find that it contains evidence, which, if believed by the jury, fully warranted the verdict rendered.

It is true there is a conflict of evidence, but the jury are much better fitted to settle such conflict than a reviewing court, and they are the tribunal instituted by the law and charged with the duty of determining issues of fact. Even in cases where, upon a consideration of all the evidence in the record, we should have reached a different conclusion from that reached by the jury, still, unless we can say that the conclusion

VOL. 27.]

Sheer v. Fisher.

of the jury is unsupported by the evidence or that it is manifestly against the weight thereof, we should not be authorized to reverse.

It is for the jury to consider and determine what weight to give to particular circumstances, and what inference to draw from all the facts in evidence, and where the cause presents, as this does, a sharp conflict of evidence on material points in the case, and no error of law intervenes, the verdict reached by the jury is conclusive and binding on a court of review.

We find nothing in the case which would warrant an interference with the verdict by this court, and there being no error of law, the judgment must be affirmed.

Judgment affirmed.

CHARLES SHEER ET AL.

V.

WILHELMINA FISHER.

Landlord and Tenant—Overloading Building—Action for Damages—Instructions—Liability of Tenant.

1. In an action to recover damages for overloading and breaking down the plaintiff's building while occupied by the defendants as tenants, it is *held*: That an instruction which ignored the question of notice of structural weakness, if any, was improperly given; that an instruction asked by the defendants was improperly modified so as to require them to show affirmatively that the fall was not due to their negligence; that certain other instructions were defective; and that the defendants had the right to have submitted to the jury the question whether the plaintiff, her agent, or other tenants, had exercised due care in loading the building.

2. A tenant is only liable for causing a permanent injury to the demised premises over and above the ordinary wear and tear, when such injury is caused by his wrongful act or negligence.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Sheer v. Fisher.

This was an action of trespass on the case by appellee against appellants and Adolph Mueller and Henry Mueller to recover damages for overloading and breaking down plaintiff's building while defendants were her tenants. The, plaintiff was owner of a building numbered 20 and 22 South Desplaines street, Chicago, fronting west, thirty-four feet wide and 160 feet deep. It was divided in the center by a brick wall laid north and south, the west half of the building being five stories high and the east half four. About the last of December, 1885, the plaintiff, by her agent, August Fisher, made a verbal lease to Sheer & Lynch, the appellants, of the west forty-five feet of the third floor in the east half of the building. August Fisher occupied all of the basement in the east half of the building, and all the first floor (except a small space therein for bins rented to Sheer & Lynch), and all of the second floor in the east half of the building. Mueller Brothers occupied the west half of the entire building, except the first floor, as a malthouse. On the trial it appeared that Sheer & Lynch were maltsters, and August Fisher, at the time of leasing to them, knew they leased the space on the third floor to store malt. Fisher testified that when he made the lease he told Sheer that he could only pile his malt six feet high, but Sheer and Henry Mueller both deny that he said anything of the kind. On the contrary they testify that Fisher then said the building was undoubtedly strong enough for storage. Sheer & Lynch took possession of the space rented, built a wooden partition at the east end thereof and had a large quantity of malt deposited there, which Mueller Brothers made for them in their malt house. The evidence was very conflicting as to the amount of malt so stored by Sheer & Lynch, and as to the third floor being overloaded by them. About a month after the renting to Sheer & Lynch they wanted malt of another grade and requested Mueller Brothers to rent from plaintiff space on the east half of the fourth floor to store that grade of malt. Accordingly Mueller Brothers did then rent of plaintiff, through August Fisher, the larger part of the space on the fourth floor of the east half of the building and commenced to store malt there, and at the time of the fall

of the building had there a considerable quantity of malt. August Fisher testified that, at the time of the latter leasing, he knew Sheer & Lynch had eight feet of malt on the third floor, and that was higher than it ought to have been. Evidence was also given tending to prove that the breaking down of the building was caused by the plaintiff in storing large amounts of hay on the first and second floors, and in recklessly and violently tumbling the bales upon the floors; that the building was poorly and insufficiently constructed, the walls being weak and defective on account of previous fires in the building. On April 17, 1886, there being then large quantities of malt stored by Sheer & Lynch on the third floor in the east half of the building, and by Mueller Brothers on the fourth floor of the east half, the roof and all of the floors east of the partition wall broke down and were destroyed.

For the plaintiff the court gave to the jury the following, among other instructions:

"1. The jury are instructed as a general principle of law that when the owner of real estate rents the same to a tenant and the tenant while in the possession of rented property causes a permanent injury to the building thereon, over and beyond the ordinary wear and tear to the same, this in the law is called waste by the tenant, and the owner's interest in property he has so rented is called his reversionary interest or estate, and the law gives the owner a remedy against the tenant for all permanent injury he so does by himself or his agent.

"2. The jury are further instructed as a general principle of law in this State, in the simple renting of a building or premises there is no implied warranty that they are fit for any particular use or business; the tenant, in the absence of a special warranty or representations on the part of the landlord, takes the property he rents at his own risk. And in the use of the property rented the tenant is bound to exercise reasonable care and prudence, and if he does not, and the property is permanently injured in consequence of the want of such reasonable care and prudence, then, and in such case, the tenant becomes liable to the owner of the reversion for such damages as are the direct results of the want of such reasona-

ble care and prudence on the part of the tenant, in the use of such premises.

"3. The jury are further instructed that, if you believe from the evidence in the case that the plaintiff was owner of the building and premises known as Nos. 20 and 22 South Desplaines street, Chicago, Illinois, in December, 1885, and that the plaintiff, by herself or agent, at that time rented to the defendants, Sheer & Lynch, a part of the third story of said building, and that they took possession of the part so rented by them, the plaintiff then retaining other portions of said building, and if you further believe from the evidence that the defendants, Sheer & Lynch, while the part rented by them was in their possession, either by themselves or their agents, unreasonably overloaded the floor so in their possession, and placed thereon more weight than was reasonable and prudent to be put there, taking into consideration the nature and character of the building and the circumstances under which it was leased, as shown by the evidence, and that in consequence of such overloading (if the evidence shows that such there was) the floor and roof and timbers and other parts of the building were broken and injured, then you should find the defendants, Sheer & Lynch, guilty, and assess the plaintiff's damages at such sum as the proof shows the injury caused, as charged in the declaration."

The court then instructed the jury to find Adolph and Henry Mueller not guilty. To the giving of said instructions the defendants, Sheer & Lynch, excepted. The defendants then asked the court to give to the jury the following, among other instructions:

"5. The jury are instructed, as a matter of law, that to entitle the plaintiff to recover it should appear by a preponderance of evidence on her part that the careless and negligent conduct of defendants, Sheer & Lynch, in overloading the third floor, was the immediate and direct cause of the fall of the building; and in case it shall appear from the evidence to the satisfaction of the jury that the fall of the building was due to other causes, such as insecure walls, bad construction, bad material, or the overloading of the other floors on the

part of the plaintiff or others, then the jury should find the defendants not guilty.

"6. If the jury believe from the evidence that the defendants had reason to suppose that the said building was reasonably strong and sufficient for the purpose for which the third floor was rented, and that said defendants used said building according to the terms of the leasing thereof, then the jury are instructed to find the said defendants not guilty.

"8. If the jury believe from the evidence that the said plaintiff did either herself, or by her agent, overload the said building, or failed in the exercise of due care and caution in loading the same, on account of which the breakage occurred, then the jury are instructed to find the said defendants not guilty.

"9. They are further instructed that if they should find from the evidence that the defendants, under the instructions of the court, were guilty of negligence in the loading of the building, and that the plaintiff was also guilty of negligence in loading the same, then the jury should find for the defendants, unless they should find that the negligence of the defendants was gross, and that of the plaintiff was slight in comparison therewith."

But the court refused to give these instructions, and altered the same so as to read as follows, to wit:

"5. The jury are instructed, as a matter of law, that to entitle the plaintiff to recover it should appear by a preponderance of evidence on her part that the careless and negligent conduct of defendants, Sheer & Lynch, in overloading the third floor, was the immediate and direct cause of the accident, and in case it shall appear from the evidence, to the satisfaction of the jury, that the accident and injury to the building was due to other causes, and not to the negligence on the part of the defendants, Sheer & Lynch, in unreasonably overloading said floor as charged in the declaration, then, and in such case, the jury should find the defendants, Sheer & Lynch, not guilty.

"6. If the jury believe from the evidence that the defendants had reason to suppose that the said building was reason-

Sheer v. Fisher.

ably strong, and sufficient for the purpose for which the third floor was rented, and the said defendants used said building according to the terms of the leasing thereof, and did not unreasonably load said floor, taking into consideration the nature and character of the building and the circumstances of the leasing as shown by the evidence, then and in such case, the jury should find the defendants, Sheer & Lynch, not guilty.

"8. If the jury believe from the evidence that the said plaintiff did, either herself, or by her agent, unreasonably overload the first and second floors of said building, or either of them, and that by reason thereof the breakage occurred, then and in such case the jury are instructed to find said defendants not guilty.

"9. They are further instructed that if they find from the evidence that the defendants were guilty of negligence in the loading of the third floor of the building and further find from the evidence that the plaintiff was also guilty of negligence in overloading the first and second floors, or either of them, then the jury should find for the defendants, unless they should further find from the evidence that the negligence of the defendants was gross, and that of the plaintiff was slight in comparison therewith."

To which refusal of the court to give said instructions as requested, and to the modification thereof, the defendants excepted.

The jury found Sheer & Lynch guilty, assessing damages against them at \$1,600 and Mueller Brothers not guilty. Motion for a new trial by Sheer & Lynch overruled and exception. Judgment on verdict and appeal.

Mr. SYDNEY C. EASTMAN, for appellant.

Mr. RUFUS KING, for appellee.

GARNETT, P. J. To charge appellants with liability for the fall of the building, it was necessary to prove, not only that the third floor was overloaded by them, but that they were informed of its carrying capacity, or had notice of facts

which would have deterred a reasonable and prudent man from placing thereon as much malt as they had stored there. There was evidence tending to prove the building poorly constructed, and from that evidence the jury had the right to infer, if they saw fit, that the building fell because of its ill construction, and that it would not have fallen had it been, in fact, such a building as its appearance indicated. It was also a question for the jury (if they found the building was badly constructed) whether Sheer & Lynch had notice of the poor character of the building. Yet they were informed by the third instruction given for the plaintiff that if Sheer & Lynch unreasonably overloaded the floor in their possession, taking into consideration the nature and character of the building, and that thereby the floor and roof, etc., of the building were broken and injured, they should find them guilty. This, in effect, makes them liable for damages that may have been caused by inherent weakness, or unsound material used in erecting the building (whether they had notice thereof or not), though the weight deposited on the floor may have been such as the apparent character of the building would have led them to believe entirely safe. The instruction having ignored the question of notice, was erroneous.

The sixth instruction asked by the defendants should have been given as asked. The court erred in inserting therein the objectionable words composing a part of the plaintiff's third instruction, upon which we have already commented.

The fifth instruction, in the form requested by the defendants, might have been refused by the court, because the jury would thereby have been told that the plaintiff could not recover unless the loading of the third floor by Sheer & Lynch was the immediate and direct cause of the fall. If they had negligently overloaded the third floor, so that a very moderate and proper load afterward placed on the second floor by plaintiff, without notice of danger, caused the building to fall, the defendants would be liable for the injury, although its immediate and direct cause was the proper load thus placed on the second floor. But the addition made by

the court to this instruction made it necessary to a successful defense, not only that the injury to the building was due to other causes than overloading by Sheer & Lynch, but that they should also believe affirmatively that such injury was not due to their negligence in overloading. The effect of this addition was to impose upon the defendants a burden which the law does not require them to bear. It is enough for their defense that the evidence should show that the building fell from causes other than their overloading, and that it should fail to show that it was caused by their negligence in overloading. But the instruction as given required the evidence to show affirmatively that the fall was not due to the negligence of Sheer & Lynch, which is a materially different thing from the failure of the evidence to show their negligence. And this is a fatal error, although the instruction as requested by the defendants was erroneous. The court should have refused it, instead of placing it before the jury with an additional and unjust burden laid upon the defendants, which they had not volunteered to assume.

The counsel for appellants has argued, at some length, two other propositions, viz.: (1) The fault of appellee in tumbling bales of hay upon the first and second floors; (2) the liability of appellants for any overloading of the fourth floor that may have been done by Mueller Brothers; and it is taken for granted that these questions were fairly presented to the jury by the eighth and ninth instructions asked on behalf of appellants. They had the right to have submitted to the jury the question whether the plaintiff, or her agent, had exercised due care and caution in loading the building. This involved not only the weights actually placed by her, or her agent, on the other floors of the building, but the manner of placing them there. A hundred bales of hay might have been safely wheeled or hoisted into the first and second stories of the building if carefully and cautiously done, while recklessly throwing them from a wagon upon the first floor, or from a hoisting apparatus upon the second floor, might have caused the very damage of which the plaintiff now complains. As we have shown in the statement of facts, there was evidence

tending to prove that plaintiff's bales of hay were recklessly and violently thrown upon the first and second floors, and the defendants may have the attention of the jury drawn to this feature of the case by a proper instruction on the question of negligence and comparative negligence.

Then appellants claim that the overloading, if there was any, was done either by plaintiff or Mueller Brothers. The renting to Mueller Brothers was about a month after the lease to appellants, and after August Fisher saw more malt on the premises of Sheer & Lynch than he thought there ought to be. He was the plaintiff's agent in these transactions with appellants and Mueller Brothers, and she is chargeable with such knowledge as he had, at the several times, in respect to the building and its occupation. The renting to Mueller Brothers would seem to have been influenced by the desire to make the premises bring more rent, although he then believed the third floor overloaded. No doubt a landlord may prudently and reasonably rent to different persons separate parts of the same building, but if he should so let his building it is manifest that the first tenant is not responsible for the acts of the others in the use of the premises rented by the latter. The negligent act of the latter tenant in the use of said premises is not the act of the landlord (as implied by the eighth and ninth instructions), as the offending tenant is not the agent of the landlord. These two questions the defendants are entitled to have presented to the jury by proper instructions, but they were not so presented by the eighth and ninth instructions, or by any other.

The first instruction given for plaintiff contains a naked proposition of law which is not sound, and the first sentence of the second a supposition which is not sound in its application to the facts of this case. A tenant is not absolutely liable for causing a permanent injury to the demised premises over and above ordinary wear and tear, as stated in the first instruction; such injury must be caused by some wrongful act or negligence of the defendant before he can be made to respond in damages. Nor was the renting to Sheer & Lynch a simple renting, as the jury might infer from the second instruc-

tion. Both the witnesses who testified for plaintiff as to the renting, stated that the purpose for which the premises were leased was spoken of when the lease was made. What influence, if any, these two instructions may have had in misleading the jury, we are unable to say, nor do we say that the judgment should be reversed if these were the only errors in the record; but we think these two instructions should not have been submitted without alterations to make the first conform to the law, and the second to the facts of this case. Whether the renting of premises for a particular purpose, known to the landlord when the lease is made, will or will not raise an implied warranty that they are suitable for that purpose, is not the question. The tenant is not seeking to recover damages from the landlord for breach of an implied warranty, but alleges, as a defense to the landlord's action, that he was led to think the building was strong enough for the purpose for which he used the demised premises. If the jury thought the alleged representation by Fisher was not made by him, they might still have found that such belief by appellants was justifiable, if no warning was giving as to the amount of malt that could be safely stored on the floor rented to appellants.

The judgment is reversed and the case remanded.

Reversed and remanded.

ALBERT MUELLER

V.

HENRY F. KLEINE.

27	473
51	396

Restraint of Trade—Agreement—Liquidated Damages—Question for Jury.

An agreement for liquidated damages for the breach of a condition in a contract of sale of a business that the vendor will not open a similar business within a certain distance and within a certain time, will be enforced unless it appears that the amount named is oppressive and unjust.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. WILLIAM VOCKE and HARVEY STORCK, for appellant.

Messrs. ROBERTS, HUTCHINSON & THOMAS, for appellee.

"Where a contract is of such a character that the damages which must result from a breach of it are uncertain in their nature, and not susceptible of proof by reference to any pecuniary standard, it is deemed especially fit that the parties should liquidate the damages, and any stipulation they make ostensibly for that purpose receives favorable consideration." 1 Sutherland on Damages, 492; Bagley v. Peddie, 16 N. Y. 469.

"Damages for breach of contracts for the purchase of goodwill of an established trade or business, or for the withdrawal of competition, are so obviously uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases." 1 Sutherland on Damages, 507; Dakin v. Williams, 17 Wend. 447; Jaquith v. Hudson, 5 Mich. 123; Cushing v. Drew, 97 Mass. 445.

Per Curiam. On May 1, 1884, appellant sold to appellee a beer saloon, at 90 East Washington Street, Chicago, with all the furniture, fixtures and good will, for the sum of \$4,000. At the time the transaction was consummated, and as a part thereof, appellant executed and delivered to appellee the following agreement:

"For and in consideration of the sum of one dollar in hand paid me by Henry F. Kleine, the receipt whereof is hereby acknowledged, that I agree not to open a saloon within two thousand (2,000) feet of No. 90 E. Washington Street within two years from the date hereof, I also agree to pay to Henry F. Kleine, or his heirs or assigns, the sum of ten dollars (\$10) per day as liquidated damages if I should open a saloon within the above named vicinity, meaning and intending by this agreement to guarantee to the said Kleine all the benefits that

Mueller v. Kleine.

may arise from my good will from the business that I have established at my late place, No. 90 E. Washington Street.

May 1, 1884.

ALBERT MUELLER. [SEAL.]”

The suit was brought to recover \$10 per day as liquidated damages, appellee alleging that appellant had opened a saloon within 2,000 feet of No. 90 East Washington Street on September 1, 1884, and had ever since continued the same open and in competition with the saloon sold to appellee. A verdict for appellee for \$2,500 was found and judgment entered thereon.

It is claimed that the evidence shows appellant was in charge of the saloon complained of, as the representative of the K. G. Schmidt Brewing Co., and not otherwise, until after May 1, 1886.

On this point the jury have found against Mueller, and we think the finding fully sustained by the evidence.

The parties voluntarily agreed upon \$10 a day as liquidated damages for violation of the agreement. Why that agreement should not be enforced as entered into is not made to appear. There being no facts disclosed by this record, from which a reasonable inference can be drawn that the amount named is oppressive and unjust, and the damages from a violation of the contract being uncertain, the agreement of the parties must prevail.

On similar contracts the amount designated by the parties as liquidated damages has been held recoverable. *Downey v. O'Donnell et al.*, 86 Ill. 49; *Dakin v. Williams*, 17 Wend. 448; *Jaquith v. Hudson*, 5 Mich. 123. See also *Cushing v. Drew*, 97 Mass. 445.

There is no ground for objection to the modification of defendant's instruction. The plain intent of this agreement was to secure appellee against competition by appellant within the prescribed time and space, and nothing more was accomplished by the instruction as amended.

Appellant denies that the consideration of one dollar (\$1) was ever paid to him. But appellee testified that it was included in the \$4,000, and the jury have so found by their verdict.

The judgment is affirmed.

Judgment affirmed.

27 476
64 544
128 655

THE CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY
COMPANY AND THE CHICAGO & NORTH-
WESTERN RAILWAY COMPANY

v.

MARY A. SNYDER, ADMINISTRATRIX.

Personal Injuries—Railroads—Death of Conductor—Action for Damages—Second Appeal—Res Adjudicata—Instructions—Error without Prejudice.

1. Upon a second appeal, the decision of the Supreme Court, on appeal from the former decision of this court, is conclusive of the questions then involved.

2. This court will not reverse a judgment because of improper modifications of an instruction, which could not have misled the jury to the injury of the appellant.

3. This court affirms a judgment against two railroad companies for damages for causing the death of a conductor who was in the employ of one of the defendants, two juries having found the same verdict and there being no substantial error in the record.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. E. WALKER, for the Chicago, Milwaukee & St. Paul Railway Company, appellant.

Mr. W. B. KEEP, for the Chicago & North-Western Railway Company, appellant.

Mr. MASON B. LOOMIS, for appellee.

GARY, J. This case is in this court for the second time. A judgment of the Superior Court for the appellee, for the same sum as now, upon substantially the same evidence, was here affirmed, upon a former appeal, but no opinion was

then filed, the law requiring opinions by the Appellate Courts in cases affirmed having been passed subsequently. That judgment was reversed in the Supreme Court for error in giving one, and refusing another instruction. 117 Ill. 376.

The objection then sustained to the then third, now second, instruction for appellee, has been removed by a clause leaving to the jury the question whether not only the deceased, but those engaged with him in the management and operation of the car and engine, were exercising due care, etc. And the same instruction first given then, is now repeated. There is no occasion now, for this court to consider the objections that appellants make to that second instruction, as the opinion of the Supreme Court, on the first appeal, is the law of the case on all subsequent ones, to the same, and much more to this subordinate court. *Newberry v. Blatchford*, 106 Ill. 584.

The St. Paul Company asked the court to give to the jury this instruction:

"5. If the jury believe from the evidence that the witness Torrence had charge of the semaphore, and that he was employed and discharged by the defendant, the Chicago and North-Western Railway Company, and if you further believe from the evidence that the injury complained of resulted from the negligence of said Torrence in giving his signal to the train of the North-Western Company, of which the deceased, Snyder, was the conductor, then the court charges you that Torrence in giving such signal was the agent of the defendant, the Chicago and North-Western Railway Company, and that the Chicago, Milwaukee and St. Paul Railway Company is not liable for any damages resulting from any negligence of Torrence in giving signals to trains of the Chicago and North-Western Railway Company."

Which was modified by the court by inserting "paid" after "employed" and "alone and was under its sole control" after "company," where that word first occurs in the instruction. This modification was excepted to and is assigned as error.

This instruction might well have been refused, for the only evidence as to the relations of Torrence with the defendants

is his own testimony that he was a North-Western man when he went there and was sent there by that company, but drew his pay from the pay car of both companies, and that of the other employes engaged with him, two were North-Western men and one a St. Paul man, and they all drew their pay from both companies. The fact that he had been a North-Western man and was sent there by that company, did not authorize the court to tell the jury that he was the agent only of that company when he was paid by both, and when the same act which opened the track of either company shut the other. There is no evidence that he was discharged. If he was employed by both, he was by each, and in giving a signal to the train of one company, he also gave it, if a train of the other company was there, to that also, and so the effect of this instruction as asked was, that though he was the servant of both and actually at the moment doing the work for both, yet neither was liable, because he was employed by, and at work for the other. The modification would have been proper if there had been any evidence upon which to base it, but the lack of such evidence cannot be complained of, as there is no escape from the conclusion that he was the agent of, and acting for both appellants at the time of the accident. The modifications could not have misled the jury to the injury of the appellants. *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455.

The accident occurred before daylight on a foggy morning in October, 1882. At the place of the accident the tracks of the North-Western run east and west, and those of the Saint Paul cross them from the southeast to the northwest at a very acute angle. There was a west bound train of each company waiting to make the crossing, as well as the east bound car and engine of which the deceased was conductor. The movements of all should have been governed by lights shown at the semaphore, about ninety feet west of the most western point at which the tracks of the two companies touched each other. Somebody blundered; it might have been the engineer working with deceased, in which case there could be no recovery. It might have been the servants of the Saint Paul operating their west bound train, and then that company only

Kramer v. Ferry.

would be liable. It might have been, and, upon a great mass of testimony much of which is confused and conflicting, the jury have found that it was, the servant of both companies, operating the semaphore. It would serve no good purpose now to recite that testimony.

Two juries have found the same verdict upon it, one of which verdicts has heretofore been sustained here.

I wish to add on my own account, that this case was considered and determined, without dissent, in a conference of the judges of this court while Judge McAllister was living and present. It had not, before I came here, been assigned to any judge to prepare the opinion of the court in it. In the distribution in rotation this case fell to my lot. The other judges did not, nor do I, deem it improper for me to write that opinion, although the first trial of the case was before me in the Superior Court.

There is no error against appellants, and the judgment is affirmed.

Judgment affirmed.

EMANUEL KRAMER ET AL.

V.

GEORGE J. FERRY ET AL.

Removal of Causes—Jurisdiction of State Court—How Regained—Statute—Failure to File Transcript in Federal Court.

1. A State court loses jurisdiction of a removable cause upon the entry of an order of removal, and can only re-acquire jurisdiction through an order of the Federal court remanding the cause under Sec. 5, Act of March 3, 1875.
2. Failure to file a transcript of the record in the Federal court does not operate to re-invest the State court with jurisdiction. Hence a certificate of the clerk of the Federal court to such failure, even if a part of the record, does not authorize the State court to proceed with the cause.

[Opinion filed December 18, 1888].

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

The record in this case shows a suit commenced by service of summons, a declaration on a promissory note, an appearance by the plaintiff in error, and, on February 3, 1885, a petition in regular form by said plaintiffs in error for the removal of the case to the United States Circuit Court for the Northern District of Illinois. A bond, as required by the United States Statute, was filed and approved by the Superior Court, and on February 4, 1885, an order was entered transferring the cause to the United States court, and directing that the clerk forthwith transmit to said court a full and complete transcript of all the papers and pleadings in the cause. December 10, 1885, there was filed in the Supreme Court a certificate of the clerk of the United States Circuit Court that no transcript of the record from the Superior Court in said cause was filed in said Circuit Court since February 1, 1885; and on the same day, on motion of attorney for the defendants, in the Superior Court, ordered that this cause be, and is hereby, reinstated and redocketed, and that the defendants are required to plead on or before the coming in of court and opening thereof at 10 o'clock Saturday morning next. On December 12, 1885, default of the defendants was entered for a failure to comply with the rule to plead, and the court assessed the damages and entered a judgment against them for \$2,673, to reverse which the record is brought to this court by writ of error.

Messrs. MOSES & NEWMAN, for plaintiffs in error.

No counsel appeared for the defendants in error.

MORAN, J. The petition shows a case coming clearly within the provisions of the act of Congress authorizing the removal of the cause from the State to the United State courts, and all the proceedings for the removal having been formal and regular, the State court, at the time it entered the order of removal, lost all jurisdiction over the case. Even if the court had refused to enter the order, the case being one for removal

Kramer v. Ferry.

and the petition and bond sufficient, the State court would be ousted of jurisdiction, and proceeding therein by such court thereafter until the case should be remanded to it in accordance with the statute would be *coram non judice* and void. *Gorden v. Langest*, 16 Pet. 97; *Stevens v. Phoenix Insurance Co.*, 41 N. Y. 149; *Shaft v. The Phoenix Mutual Ins. Co.*, 67 N. Y. 54.

The case passed to the jurisdiction of the United States court, and, for anything that appears in this record, there it still remains.

The certificate of the clerk of the United States court can not be considered as part of this record; but if it could be, the matter would be in no manner changed. Failure to file a transcript of the record in the United States court can not reinvest the State court with jurisdiction of the cause. The act of Congress provides for returning certain cases to the jurisdiction of the State courts, as follows:

"When it shall be made to appear to the satisfaction of said Circuit Court at any time after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss or remand it to the court from which it was removed, as justice may require." Sec. 5, Act of March 3, 1875.

Until there is an order in pursuance of the foregoing section remanding the case, it will, if once properly removed, remain within the jurisdiction of the United States court. *Lawton v. Blitch*, 30 Fed. Rep. 641.

The record presented shows that the State court lost jurisdiction of the cause and that it did not regain it, and it follows that, when the judgment was rendered against plaintiffs in error, the Superior Court was wholly without jurisdiction, and the judgment must be reversed.

Judgment reversed.

CITY OF CHICAGO

V.

HARRIETT W. REED ET AL.

Riparian Rights—Wharf—Erection of Building—Bill to Enjoin—Municipal Corporations.

1. A municipal corporation can not maintain a bill to enjoin the erection of a building or buildings on premises occupied by a wharf which is alleged to extend into a navigable stream, on the ground that the complainant may, at some future time, condemn the premises or part thereof for the construction of a bridge.

2. In the case presented, as the bill does not attack nor seek to disturb the actual occupation of the premises for purposes of a wharf, it must be presumed that such occupation is proper.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

Messrs. HAYNES & EASLEY and JOHN W. GREEN, for appellant.

In this suit the object is to restrain the use of the property for any other purpose than a wharf. Under the view we take the appellees may have the right to maintain the wharf, but not the right to destroy the wharf by the erection of a permanent building thereon.

The evidence shows that the wharf projects into the navigable river, is a substantial obstruction to navigation, and that any contemplated improvement to be made in the river at State street, involves the idea that the navigable waters adjacent to the defendant's property shall be preserved. The property in controversy being a wharf and the defendants having no other right therein than a mere wharfage right, they can not place any obstruction upon the wharf, or divert it to any other use. *People v. Macy*, 62 How. Pr. 65; *Degan v. Dunlap*, 15 Phila. 69; *Bingham v. Doane*, 9 Ohio, 165.

When rights have once become vested in the public in a river, in fact navigable, they can not be divested except by

City of Chicago v. Reed.

appropriate legislation. Angell on Water Courses, Sec. 254; Gould on Waters, Sec. 139; People v. City of St. Louis, 5 Gilm. 375; Logan Co. v. City of Lincoln, 81 Ill. 158.

The city has the right to maintain this action, because the State has delegated the power to it, by the acts pleaded in the bill and amendments thereto, so to do. McCartney v. C. & E. Ry. Co., 112 Ill. 613; People v. Macy, 62 How. Pr. 65. Even if this position could be successfully refuted the proof made in the record of the incalculable injury that the erection of a permanent building upon this wharf would inflict upon the city in hampering it in its improvements of State Street, and the contemplated bridge there, is a sufficient special injury to entitle it to restrain the defendants from improperly diverting the premises in controversy from use as a wharf. It has a special interest in the premises as public property, to prevent the defendants from misappropriating the wharf, and put it to the expense of condemning structures that the defendants have no right to erect upon the wharf.

Messrs. SMITH & PENCE and EDWIN F. BAYLEY, for appellees.

The owner of lots bordering upon a river owns the bed of the river to its center, subject to the public easement of navigation. The riparian owner has the right to erect wharves and docks to the line of navigable water, or even beyond, if he does not thereby impair the public right of navigation. Middleton v. Pritchard, 11 Ill. 554; City v. Laffin, 49 Ill. 172; C. & P. R. R. Co. v. Stein, 75 Ill. 41; McCartney v. C. & E. R. R. Co., 112 Ill. 611; Yates v. Milwaukee, 8 Wall. 497 (cited with approval in C., R. I. & P. R. R. Co. v. City of Joliet, 79 Ill. 44); Browne v. Chadbourne, 31 Me. 9; Lorman v. Benson, 8 Mich. 18; Gough v. Bell, 23 N. J. L. 441; Jones v. Soulard, 24 How. 44.

Artificial accretions belong to the owner of the bank. Wetmore v. Atlantic Company, 37 Barb. 70.

Whether accretions are artificial or gradual, the same rule applies; they belong to the owner of the land. Steers v. Brooklyn, 101 N. Y. 51.

Non-navigable streams stand on the same footing as other private property, so far as the right of eminent domain is concerned. *Smith v. Gould*, 59 Wis. 631.

The riparian owner, whether he owns to the thread of stream or not, has the right to construct in shoal water in front of his property, at his peril of obstructing navigation, far enough to reach actually navigable water. *Desplaines v. Railroad Co.*, 42 Wis. 214; *Rippe v. Railroad Co.*, 23 Minn. 18; *Benson v. Monow*, 61 Mo. 345.

GARY, J. In the year 1839 the United States platted Fort Dearborn Addition to Chicago, and divided the 231 7-10 feet, on the north side of South Water street in the city of Chicago, bounded north by the river and west by State street, into four lots, the east line of the east lot being 166 feet long and the west line of the west lot 45 feet long. The north line along the river was not straight, but made angles to the north, going from west to east, at the places where the lines between the lots come to the river, so that the north line of the four lots was a concave one on the river, not by a curve, but by a succession of straight lines on the north boundary; that of each lot trending more to the north in going east, than the line of the lot next west.

For many years before the fire of 1871, the lots were used as a wharf, but there was frequent need of dredging in front of them, caused by the approach to the State street bridge projecting, and by a sewer there emptying into the river, the effect of which was that there was a deposit of matter in the bed of the river in front of the wharf.

This dredging was done by the occupiers of the wharf. When the fire came it burned up the bridge and wharf. The city in rebuilding the bridge, extended the approach still further into the river, and the occupiers of the wharf, without authority from anybody, rebuilt the wharf some twenty feet further into the river at the west end than it had been before. At the east end the encroachment is less. The north line of the wharf is made straight from the west, very nearly to the east end of it, thus destroying the cove or bay which had existed in the river in front of the wharf.

Vessels in passing the bridge eastward bound are compelled to turn more to the north, and a vessel lying at the wharf is more in the way of navigation than before.

In January, 1887, the city filed a bill against the appellants from which are taken the following extracts:

"Your orator further represents that it is a city of about 750,000 inhabitants, about one-fourth of whom reside upon the north side of the Chicago river, and about one-fourth upon the south side thereof, and that the greater part of the business of said city is done upon the south side; that the means for communication between the sections of this city are already far inadequate to the demands thereof; that the population of said city is growing at a rapid rate, and the demands of commerce are increasing in the same proportion; that, in order to partially meet the needs and necessities of the public, your orator now has under consideration the construction and operation of a large double track steam swing bridge at State street; that the river at that point, owing to contraction of said river hereinafter named, is too narrow for the construction and operation of such a bridge as is contemplated and required, without interfering with the navigation of said river.

"Your orator further shows that the space so filled is needed and required in the construction, operation and maintenance of a bridge at State street as aforesaid; that without said space it will become necessary, in order to afford proper means of communication as aforesaid, to impede and interfere with the navigation of said river.

"That said Allerton, as your orator is informed and believes, is about to erect upon said space so filled in, a large and permanent building, which, if so erected, will effectually deprive your orator of the use of the space aforesaid and result in the narrowing of the river at that point and thereby impede its navigation, to the great injury and detriment of your orator and of the public," and the prayer is, speaking of the appellees, that "they and each of them may be restrained by this court from in any manner incumbering or conveying said space of ground, formerly a part of the river as aforesaid, and from in any manner erecting a building or buildings, or doing anything thereon which will in any way interfere with the

right of your orator to the uses of said premises for the purposes herein stated, and your orator may have such other and further relief in the premises as the nature of the case shall require, and to your honors shall seem meet."

There is no specific prayer that the encroachment may be abated as a nuisance, nor any argument by appellant that, under the general prayer, this might be decreed, and, therefore, that question will not be considered.

This is a bill *quia timet*, which, while it does not admit the rightful, yet does not attack and seek to disturb the actual occupation of the premises as a wharf. "Things are held to be legally and properly in their existing state, until the contrary be shown." Cowen & Hill, note to 1 Ph. Ev. 603.

The same principle has often been applied in this State to the possession of real property. Doty v. Burdick, 83 Ill. 473; Herbert v. Herbert, Breese, 354.

For the purposes of this case, appellant not seeking to disturb the possession, it must, without looking at its origin, and, notwithstanding the objections of the appellant to it, be treated as what, in the lapse of time it may, if it has not now, become, namely: Full and complete ownership, invulnerable against all attacks.

If the ownership of the premises is in any of the appellees, the court can place no restraint upon them as to the buildings they shall erect, upon the plea that it is probable that the city will at some future time, take a part of the property under the eminent domain law, and, if buildings are erected, will have more to pay than if they are not. The final argument for the city is:

"It has a special interest in the premises as public property to prevent the defendants from misappropriating the wharf, and put it to the expense of condemning structures that the defendants have no right to erect upon the wharf." No authority is cited for this position, nor is it probable that any will ever be found.

The decree dismissing the bill is right.

Decree affirmed.

Judge GARNETT takes no part in this decision, having tried the case in the Superior Court.

Chapman v. Chapman.

EDWIN TAYLOR CHAPMAN

v.

ANNIE CHAPMAN.

Divorce—Questions for Jury—Newly Discovered Evidence—Practice—Abstracts—Instructions.

27	487
50	247
50	546
27	487
64	367
27	487
75	655

1. This court declines to discuss the instructions in detail, the appellant having failed to include them in the abstract.

2. Upon appeal from a decree granting a divorce, it is *held*: That the court properly refused to admit evidence touching a defense not made in the answer; and that the defendant is not entitled to a new trial on the ground of newly discovered evidence.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

Messrs. WILLIAM H. SISSON and CLARENCE F. GOODING, for appellant.

Messrs. GEORGE A. MEECH and WILLIAM C. ASAY, for appellee.

GARY, J. Whether the appellee was entitled to a divorce from the appellant, depended upon whether he had committed adultery as charged in her bill; and, if so, whether she, at the time thereof and at the time she filed her bill, August 23, 1886, was a resident of this State.

The jury found the issues upon these points in her favor, upon evidence which, if not satisfactory, was sufficient to make their decision of the question final, if the court committed no error. Complaint is made that the court refused to admit in evidence letters written by her. There was no issue to which they could relate. At the most they might tend to show, not quite connivance, but her willingness that he should seek other women. No such defense was made in his answer.

As to the instructions, they can, by spending time upon them, be shown to be correct; but the appellant has not deemed it necessary to comply with the 21st rule of this court relating to abstracts, and the court will not perform labor that should be done by the party. *Fisher v. Cook*, 23 Ill. App. 621.

The alleged newly discovered evidence has reference to the engagements of appellee as an actress; where the company she was with was at different times, and the dates of their journeys from place to place. As the appellee knew before the trial how she had been employed, there was a total want of diligence in ascertaining and proving these details, if they were material.

The trial was in January, 1888, and her deposition in which she had testified to her residence, had been on file from the previous August, so that his surprise at her testimony was not very sudden. There is no error in the record and the decree is affirmed.

Decree affirmed.

Judge GARNETT takes no part in this decision.

GEORGE HOSMER ET AL.

v.

MARCUS TELLER.

Attachment—Instruction to Find for the Defendant—Practice.

This court sustains the action of the court below in instructing the jury, at the close of the plaintiff's case, to find for the defendant as to the attachment issue, the evidence being insufficient to sustain a verdict for the plaintiffs.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. HOLZHEIMER, ELIEL & ROSENTHAL, for appellants.

Mr. W. A. SCHONFELD, for appellee.

Per Curiam. Appellants commenced an action by attach

W. U. Tel. Co. v. De Golyer.

ment against appellee, the grounds stated in the affidavit being that appellee had within two years preceding the filing of the affidavit fraudulently conveyed or assigned his effects or a part thereof so as to hinder and delay his creditors, etc. Appellee traversed the allegations of fraud. On the trial, after the plaintiffs had rested, the court instructed the jury that, under the evidence, their verdict as to the attachment issue should be for the defendant.

Plaintiffs appeal, and assign the giving of said instruction for error. We have examined and considered the evidence introduced by appellants in support of the allegations of fraud contained in the affidavit, and while there were some acts of appellee that may have furnished ground for suspicion, we are of opinion that there was no evidence which would justify a verdict against appellee on the fraud issue. It can not be said, perhaps, that there was not some slight evidence, but we are of opinion that a verdict based on it could not be sustained, but would have to be set aside by the court. Such being the case, the court properly instructed the jury to find for the defendant on said fraud issue, and the judgment must be affirmed.

Judgment affirmed.

THE WESTERN UNION TELEGRAPH COMPANY

V.

WATTS DE GOLYER ET AL.

27	489
50	588
27	489
109s	617

Failure to Send Telegram—Action for Damages—Questions for Jury-Practice.

In an action against a telegraph company to recover damages for a failure to send a telegram, it is *held*: That the question whether the plaintiff assented to a printed clause on the blank used, requiring claims for damages to be presented within sixty days, and whether the claim was presented within the time so limited, were for the jury; and that, although the verdict appears to be excessive, this court can not reverse on that ground as the question was not raised in the court below.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. WILLIAMS & THOMPSON, for appellant.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellees.

MORAN, J. This is an appeal from a judgment recovered by appellee against appellant in an action for a failure to send a telegram delivered to appellant in Chicago to be transmitted over its line to Savannah, Georgia.

Appellant's defense was that the claim was barred by failure of plaintiffs to present the same to appellant in writing, within sixty days after the message was delivered to it to be sent.

Whether this defense existed or not depended on the question whether the notice or clause printed on the telegraph blank used by plaintiff had been assented to by him, and on the further question whether, in fact, the claim was presented to appellant within sixty days.

Both these questions were fairly left to the jury under an instruction given by the court at the request of the defendant, and the verdict must be taken as settling that issue against the contention of appellant.

We have examined the instructions refused by the court and are of opinion that no error was committed in that regard.

Appellant contends that the verdict is excessive in about the sum of \$31, and we are inclined to think that contention correct; but we can not reverse for such error, for the reason that it does not appear that the attention of the trial court was called to this excess in the verdict, and it is not covered by any of the reasons assigned in the motion for a new trial. *Emory v. Addis*, 71 Ill. 273; *O., O. & F. R. V. R. R. Co. v. McMatt*, 91 Ill. 104.

There is no error in the record which authorizes a reversal by this court, and the judgment must therefore be affirmed.

Judgment affirmed.

Thomas v. Kelley.

JAMES B. THOMAS
v.
DAVID KELLEY ET AL.

Practice—Dismissal of Appeal—Motion to Set Aside Order—Insufficient Affidavit—Practice.

1. This court affirms an order denying a motion to set aside an order dismissing an appeal from a justice of the peace for want of prosecution, the affidavit in support of such motion being merely upon information and to the effect that the appellant's attorney was ill and had been for a long time unable to attend to business, at the time of such dismissal.

2. The showing made in support of a motion to set aside an order dismissing an appeal for want of prosecution, will be strictly scrutinized.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. W. A. PHELPS, for appellant.

Messrs. SHUMAN & DEFREES, for appellees.

Per Curiam. Appellant having appealed from a judgment by a justice of the peace to the Circuit Court, his appeal was, by the latter court, dismissed for want of prosecution on the call of the calendar on September 20, 1887. On October 6, 1887, appellant made a motion supported by affidavit, to set aside the order of dismissal and reinstate the appeal. The motion was denied, exception taken and appeal by appellant. The affidavit fails to make any satisfactory statement in excuse of the inattention which caused the dismissal. It states merely upon information that the attorney of appellant was ill, and unable to attend to business at the time of the order of dismissal, and that he had been for a long time unable to attend to business. No excuse is given for not presenting the affidavit of some person who had personal knowledge of the attorney's illness, nor is there any denial that appellant was aware of his ill health long enough before the dismissal to have procured other counsel.

A motion of this character is heard on affidavits presented by the moving party only, counter-affidavits not being allowed. Hence the showing made in support of the motion should be strictly scrutinized. *Mendell v. Kimball et al.*, 85 Ill. 582.

We find no reason to interfere with the order of the Circuit Court in overruling the motion, and it is therefore affirmed.

Order affirmed.

REGINA WATSON

V.

CHARLES CARPENTER ET AL.

Mechanic's Lien—Contracts—Parties—Husband and Wife—Agency.

Upon appeal from a decree for a mechanic's lien, it is *held*: That it may be fairly inferred from the evidence that the appellant, the owner of the premises, and her husband, made one of the contracts in question, and that the husband acting as the wife's agent made the other of said contracts.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. KING & PACKARD, for appellant.

Mr. ELIOT FURNESS, for James B. and Michael Sullivan, appellees.

Per Curiam. These cases were consolidated and heard together in the Superior Court, a decree being entered for a mechanic's lien to the extent of \$291.19 in favor of Carpenter, and \$486.10 in favor of James B. and Michael J. Sullivan. From that decree the owner of the premises, Regina Watson, appeals.

Watson v. The People.

We think it may be fairly inferred from the evidence that appellant and her husband made the contract with Carpenter, and that her husband, acting as her agent, made the contract with the Sullivans. In pursuance of those contracts the labor and material were furnished. The house where the improvement was made was the residence of the Watsons. Appellant was present when the work under both contracts was begun. She was at home nearly all the time while it was in progress, repeatedly giving directions about it and at times selecting the material to be used. The case is somewhat involved by the fact that the work in one or more rooms of the house was ordered by one Ives, and appellant's defense was that he alone was the contracting party for the whole of the improvements.

There was no decree for the work and labor which was done for Ives, and we think the court was not in error in finding the contracts sued on were, in law, the contracts of Regina Watson.

The decree of the court below is affirmed.

Decree affirmed.

WILLIAM I. WATSON
v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Conspiracy—False Pretenses—False Bookkeeping and Reports—"Obtain"—Penal Laws—Strict Construction—Want of Prosecution—Criminal Code, Starr & C. Ill. Stat. ¶ 498—Jurisdiction—Practice.

1. False bookkeeping and false reports to conceal an embezzlement will not support a charge of conspiracy to obtain money by false pretenses.
2. The word "obtain" is not used in the statute as synonymous with the word "retain."
3. Penal laws are strictly construed. The law regards primary or proximate, not secondary or remote causes.
4. The term at which the accused is committed is not regarded as the first term under the statute providing for a discharge for want of prosecution. Where the defendant is on bail, it will be presumed that the case was

continued at a subsequent term or terms by mutual consent, unless the record shows that he appeared and demanded trial.

5. This court will not consider a suggestion that it is without jurisdiction of an appeal where the case has been presented on the merits by briefs on both sides.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. THOMAS J. WALSH, for appellant.

In order that money may be obtained by false pretenses, it is requisite that the possession of the money be in some person other than the accused, for it is necessary to prove a delivery of the property. *Parker ex parte*, 11 Neb. 309; *Morgan v. State*, 42 Ark. 131. Imposition is an essential element of the crime; but for a man to impose on himself is impossible. The obtaining money by false pretenses presupposes some hinderance in the way which is to be removed by practicing some kind of deceit.

There was no hinderance of that kind for these defendants to remove. There was no opposing mind to play upon. The money had already been obtained by them without false pretenses from persons who had purchased merchandise of the Ansonia Clock Company, and had been received by the defendants in pursuance of their duty as agents of the company. For retaining money a different statute is provided.

There was no money delivered to the defendants, or expected to be delivered to them, with the intention of transferring to them the ownership of it. The money they received came to their possession as agents of the Ansonia Clock Company, and their possession was the possession of the Ansonia Clock Company. *Johnson v. People*, 113 Ill. 99. But in order that goods or money can be "obtained" by false pretenses, it is not sufficient that the possession pass, but the property also must be transferred; and where the possession merely is obtained by false pretenses, and the property is afterward converted, this is not obtaining by false pretenses, but embezzle-

Watson v. The People.

ment or larceny. *State v. Vickery*, 19 Tex. 326; 2 Russell on Crimes, 663 n.; *State v. Anderson*, 47 Iowa, 142.

If a person should obtain employment by false pretenses and then embezzle the money of his employer is he guilty of obtaining money by false pretenses? The authorities say not; for it is requisite that the false pretenses should be the immediate cause of the transfer of the property. *R. v. Gardner*, 36 Eng. L. & Eq. 640; *R. v. Jones*, 15 Cox C. C. 475; *Wharton Crim. Law*, Sec. 1175. And following this doctrine it is held that obtaining credit by false pretenses is not within this statute. *R. v. Eagleton*, 6 Cox C. C. 559; *R. v. Wavell*, 1 Mood C. C. 224.

MESSRS. JOEL M. LONGENECKER, State's Attorney, and WEIGLEY, BULKLEY & GRAY, for appellees.

GARY, J. The suggestion in appellee's brief, that criminal cases do not come to this court by appeal, and therefore this appeal should be dismissed, is answered by *Dinet v. People*, 73 Ill. 183, the case having been presented on the merits by briefs on both sides.

The position of the appellant that he ought to have been discharged for the delay in bringing him to trial, is not well taken. He was arrested April 14, 1887. The April term is not to be counted as the first term. *Ochs v. People*, 25 Ill. App. 379, 124 Ill. 399. At the May term the cause was continued by agreement. At the June term he pleaded not guilty and gave bail, but no other step was taken in the case. In *Gallagher v. People*, 88 Ill. 335, the Supreme Court adopt the construction which had been long acted upon by the Criminal Court of Cook County, that when a defendant is on bail, he must, in order that a term shall count, appear and ask a trial at such term, and if the record does not show that he did so, it will be presumed that the case was continued by consent of the people and the defendant. So the June term is not to be counted, as there was yet half the term unexpired when he gave bail. At the July term the case was continued by agreement to the October term, at which term, for the first time, he demanded a trial, and the trial was at the November term.

The case of Gallagher came from Champaign County, in which terms of the Circuit Court were held in March and September of each year.

He was indicted and gave bail at the September term, 1874, and his bail was forfeited at the September term, 1876. The record did not "show that the various continuances were had on the application of the people, or that the accused was present ready for, and demanding a trial."

But on the merits of the case the evidence fails to show the guilt of the defendant. This indictment is for a conspiracy "to obtain * * * from the said Ansonia Clock Company by false pretenses" money, etc. The evidence shows false bookkeeping and false reports to the home office, by the defendant, by which the fact that their money had been embezzled was concealed, but no representation, false or true, upon the faith of which anything ever came to the hands of the defendant, or his co-defendant, Gledhill.

There is no evidence, except the inference that there must have been some gain to induce the defendant to falsify the books and make false reports, that he used any of the money.

The evidence is not inconsistent with his own version, that he only did what his superior, Gledhill, told him to do. That matter, however, would be for the jury to decide, if any money was obtained by such false books and reports. Their falsity was wholly as to past transactions. The appellees endeavor, by two separate propositions, to bring the acts of the defendant within the charge in the indictment.

First, by the false books and reports the defendants did "enable themselves to retain large sums of money belonging to the company and to continue in their capacities as employes, and in the future to obtain other moneys;" and second, that "obtain" may be used as synonymous with "retain."

The answers to the first proposition are, that penal laws are to be construed strictly (*People v. Peacock*, 98 Ill. 172), and that the law regards primary or proximate, and not secondary or remote causes (*Broom's Legal Maxims*, 216); and therefore false pretenses by which one remains in a position in which he may obtain money, even if he does intend to abuse

Curtis v. Williams.

the facilities which that position gives him, are not false pretenses by which the money he afterward embezzles was obtained.

The word "obtain" is used in the statute, not in any antiquated and obsolete sense, but in its ordinary and popular signification, as an active verb meaning to acquire.

The conviction can not be sustained on the ground that so much of the indictment as relates to obtaining may be treated as surplusage, and the indictment be held good as a common law indictment for a conspiracy to defraud the company. As such it is not a good indictment. *Commonwealth v. Eastman*, 1 Cush. 189.

This view of the case makes it necessary to examine the other questions presented by the record. As the case is reversed upon the merits, it will not be remanded.

Reversed and remanded.

SARAH A. CURTIS

v.

IDA G. WILLIAMS.

Practice—Dismissal of Appeal—Act June 14, 1887—Taxation of Costs—Time.

Upon the dismissal of an appeal under the act of June 14, 1887, this court may allow as part of the costs a reasonable solicitor's fee; and where such dismissal is in vacation, the allowance may be made at the ensuing term.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, for appellant.

Messrs. ELA & GROVER, for appellee.

GARY, J. The appeal in this case was dismissed in vacation after the March term, on the 18th day of September last. The facts in relation to such appeal, and the reason for dismissing it, appear in the opinion of the court then filed. The appellant claimed the right to the appeal under the act approved June 14, 1887, State Edition, 250, Brad. 151, which provides: "If such appeal is dismissed the Appellate Court may allow to the attorney for appellee a reasonable solicitor's fee, not to exceed \$100, to be taxed as part of the costs of the appeal."

On the 25th of September, the appellees filed their motion for an allowance of \$100 under the act. The appellant opposes the motion partly upon a consideration of the object of the appeal, and the effect that might have followed if it had been a proper case for an appeal, and partly upon the grounds that if the appeal is not within the act the allowance is not; that the term at which the appeal was dismissed had passed, and the court can not at one term add anything to its judgment of a former term. The opinion already filed sufficiently exposes the unnecessary and vexatious character of the appeal. As to the first ground, questioning the power of the court to make the allowance, the act makes it "part of the costs," and costs are adjudged on dismissing an appeal for want of jurisdiction. *Bangs et al. v. Brown et al.*, 110 Ill. 93.

The tenor of the whole act shows that the legislature felt that there was danger of the abuse of the privilege granted by it. The appeal is to be taken within thirty and perfected in the Appellate Court within sixty days from the entry of the order appealed from; it is to have in the Appellate Court precedence of other business. If the case is one of which the court has jurisdiction, the ordinary course will be to affirm, modify or reverse the order appealed from, and in such cases no attorney's fee is to be allowed; only upon dismissal of the appeal.

The most frequent cause of dismissal in the Appellate Court is want of jurisdiction, under the distribution of the appellate power between the Supreme and Appellate Courts. It must be assumed that the legislature took notice of all the circum-

stances affecting the matter they had under consideration. And with such knowledge and that costs were adjudged to the appellee on dismissal of an appeal for want of jurisdiction, they incorporated in the act the provision before recited for increasing the costs. It is a prudent restraint upon the abuses of the privileges thus newly granted, and just to the adverse party.

As to the other ground no term has passed. The order or judgment dismissing the appeal was entered in vacation, under the authority conferred by ¶ 35, Chap. 37, Starr & Curtis' Ill. Stat., and Sec. 15 of "An act to establish Appellate Courts," approved June 2, 1877.

Eight days thereafter, still in vacation, the motion for the allowance was made. If the dismissal had been in term time, and the motion filed the same term but not disposed of, the power of the court to allow it at the next term would have remained. Secs. 10 and 14 of Appellate Court Act; Sec. 5, Act of 1874, relating to the Supreme Court; *Windett v. Hamilton*, 52 Ill. 180; *People v. Gary*, 105 Ill. 264.

There is no authority cited or known to this court as to the power of the court over what is done in pursuance of law, during the preceding vacation, but in the nature of things it can not be less than it would be, the same circumstances concurring, if the thing were done at the term which the vacation followed.

The appellees are therefore entitled to an allowance, "to be taxed as part of the costs," and though no objection has been made that \$100 is not "a reasonable solicitor's fee," yet, as this is the first case in which this court has been called upon to act under this provision of the statute, it will not go to the maximum, but fix the same at \$75.

The clerk of this court will therefore tax as part of the appellee's costs in this case, the sum of \$75 for their solicitor's fee.

EDWARD H. TURNER ET AL.

V.

LUCIUS B. MANTONYA.

Landlord and Tenant—Cancellation and Surrender of Lease—Question for Jury—Destruction of Premises by Fire.

In an action by a tenant to recover rent from sub-tenants, it is *held* : That the question whether there was an agreement for the cancellation and surrender of the lease was a question for the jury, and that there was no such destruction of the rooms leased by defendants as would operate to determine the lease, even if their destruction would have that effect.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. McCLELLAN & CUMMINS, for appellants.

The destruction of the premises by fire terminates the relation of landlord and tenant, for the reason that there is then nothing left upon which the demise can operate, and no rent for the premises demised can be recovered subsequent to their destruction. Taylor's Landlord and Tenant, 520; Wood's Landlord and Tenant, 603; Harrington v. Watson, 3 Pac. Rep. 173.

No further elaboration of this point is needed than a reference to the case last cited. The reasoning and the facts exactly fit the case at bar; the logic of the decision is irresistible, and the position it asserts impregnable. The decision is based on both principle and precedent, and rests for its authority on the following cases: McMillan v. Solomon, 42 Ala. 356; Austin v. Field, 7 Abb. Pr. (N. S.) 34; Graves v. Berdan, 26 N. Y. 498; Kerr v. Merchants Exchange, 3 Edw. Ch. 316; Winton v. Cornish, 5 Ohio, 477; Womack v. McQuarry, 28 Ind. 103; Stockwell v. Hunter, 11 Mete. 448; Ainsworth v. Ritt, 38 Cal. 89; Shawmut Nat. Bank v. Boston, 118 Mass. 128; Whitaker v. Hawley, 25 Kan. 674.

Messrs. CASE, NOLAN & HOGAN, for appellee.

MORAN, J. This appeal is from a judgment for \$179.89, rendered against appellants and in favor of appellee, for a balance of rent under a lease. Appellee leased premises from Farwell & Company, and sublet a part thereof to appellants.

Appellee's lease contained a stipulation authorizing him to terminate said lease upon the premises becoming damaged by fire so as to be unfit for occupancy, but there was no such provision in appellants' lease. The term of appellants' lease would end December 31, 1885, and of appellee's lease from the Farwells on January 1, 1889.

A fire occurred on November 5, 1885, which, appellee claimed, rendered the premises unfit for occupancy, and he gave Farwells a notice to terminate the lease, and had some negotiations with appellants looking to their vacation of the part occupied by them, so that appellee could surrender the entire premises. The Farwells denied that the premises were so injured as to authorize a termination of the lease under the said fire clause, and a compromise was finally agreed upon by which, in consideration of the payment of a certain sum by appellee, the Farwells accepted a surrender of his lease.

Two contentions are urged by appellants to reverse the judgment appealed from. One is that they agreed with appellee upon a cancellation and surrender of their lease, and paid all rent due, and made an actual surrender on November 6, 1885, and hence they could not be held for rent subsequently accruing. On this contention there was an issue of fact, and we are satisfied, after a careful examination of the instructions, that such issue was submitted to the jury under a correct statement of the law by the court. As the verdict on this issue is clearly sustained by the evidence, it is conclusive against appellants' contention on this hearing.

The second position of appellants is that there was such a destruction of the premises by the fire of November 5th, as operated in law to determine the lease. The evidence as set out in appellants' abstract shows that the rooms leased by

Vol. 27.]

James T. Hair Co. v. Thorne.

appellants were rendered untenable by the fire. There is no description of the condition of the rooms or the extent of destruction, and no proof that the building and rooms could not be readily repaired and rendered tenantable.

It appears from the testimony of Farwell, who was called by the defendant, that the store was drenched with water, but that the walls were perfect. Where there is no stipulation in the lease relieving the tenant from the payment of rent in case of the destruction of the building by fire, he will be held for the rent during the entire term of the lease. Such is the general rule.

But counsel contend that there is a distinction applicable to leases of rooms or parts of a building. Assuming, but not deciding, that the distinction counsel contends for exists, the case he cites supports a rule which, as stated by the Supreme Court of this State, "requires that the part of the building or the rooms of the apartments demised shall be destroyed, and this must mean not merely damaged or injured, but annihilated; for if they remain in but a damaged condition the tenant may still occupy them, repair the damage done and restore them to their former condition if he will." *Smith et al. v. McLean*, 123 Ill. 210.

It is very clear that no such destruction of the building or of the rooms leased by appellants is shown, by the evidence, as justifies the application in this case of the doctrine which counsel contends for. *Smith v. McLean*, 22 Ill. App. 451; *Shawmut National Bank v. City of Boston*, 118 Mass. 125.

We find no error in the record and the judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

JAMES T. HAIR COMPANY

V.

WILLIS C. THORNE.

Parties—Action by Attorney to Recover Fees—Partnership.

James T. Hair Co. v. Thorne.

In an action to recover fees for legal services, this court affirms the judgment for the plaintiff, although it appears that he had a partner when the services in question were rendered, there being nothing to show that the latter was to share in the compensation for such services.

[Opinion filed December 7, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. C. C. LINTHICUM and FRANK J. SMITH & HELMER, for appellant.

Mr. W. E. THORNE, for appellee.

Per Curiam. This was a suit by appellee against appellant, to recover the value of legal services rendered to the appellant. Judgment was given for appellee, from which this appeal is taken. It appeared on the trial from the evidence of W. J. Ennison, that when the services were rendered, he was in partnership with Thorne in the law business.

The point is made that Ennison should have been a co-plaintiff. The contract for the services was made between appellant and appellee only, and the latter alone performed the entire services outside of the State of Illinois, both appellant and appellee having their places of business in Chicago. The evidence does not show what were the terms of the partnership nor where the law business of the firm was conducted. There is nothing in the record inconsistent with the hypothesis that Thorne alone was to receive the compensation for such services as those involved in this case, and we are the more inclined to that presumption, because this point is now made by appellant for the first time.

The record does not present a case for reversal on the ground that the verdict is contrary to the evidence.

Judgment affirmed.

GEORGE W. COOPER

V.

WESLEY JOHNSON.

New Trial—Newly Discovered Evidence—Conflict of Evidence—Question for Jury—Excessive Verdict—Remittitur in this Court—Costs—Bankruptcy—New Promise.

1. Newly discovered evidence which is merely cumulative is not sufficient as a ground for a new trial.
2. Where the evidence is conflicting, the verdict of the jury is conclusive.
3. Where the verdict includes excessive interest, this court may permit the appellee to remit the excess to prevent a reversal. In such a case the appellant will recover costs in this court.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. F. S. BAIRD, for appellant.

Mr. HUGH L. BURNHAM, for appellee.

GARY, J. The appellant, in 1876, assigned to the appellee a judgment of a justice of the peace, from which an appeal was then pending in the Superior Court, agreeing to prosecute it, and "in case of failure to recover and collect the sum of one hundred and thirty-five dollars," to pay to appellee fifty dollars in cash and ninety in merchandise within ninety days after final judgment. In 1880 appellant was discharged in bankruptcy.

The contest whether a new promise to pay was made by appellant, was settled by the jury in favor of appellee upon conflicting evidence. Their verdict under such circumstances is final. The affidavits on the part of appellant as to newly discovered evidence, related to conversations between the parties, of a character, so far as they are similar to those to which appellee testified on the trial, merely cumulative to his tes-

Goudy v. City of Lake View.

timony, and not at all conclusive, even if the appellant could be held to be diligent in discovering, after the trial, that a person several times present in the office of appellant when conversations occurred between the parties, was so present. *Crozier v. Cooper*, 14 Ill. 139; *Martin v. Ehrenfels*, 24 Ill. 187.

The court instructed the jury in effect that if the plaintiff recovered he was entitled to interest from March 3, 1879, to the time of trial, and appellant excepted. The ninety dollars payable in merchandise are not within the statute as to interest. "Moneys due on instruments of writing," are the words of the statute so far as applicable to this case.

As the verdict includes thirty-four dollars and thirteen cents interest on the ninety dollars, it is to that extent excessive; which, being one of the reasons for which a new trial was asked, and the refusal of a new trial being now assigned for error, the judgment must be reversed, unless the appellee will remit the excess. If he does that, the judgment for \$165.87 will be affirmed. If not it will be reversed, and the cause remanded. In either event the appellant is to recover his costs in this court.

W. C. GOUDY

V.

THE CITY OF LAKE VIEW.

Practice—Delay in Filing Briefs—Affirmance—Motion to Set Order Aside.

Upon the failure of appellant to file his briefs within the time required by the rule of this court, the motion to strike such briefs from the files and affirm the judgment should be made, if practicable, before the case is reached for argument.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. A. W. GREEN, for appellant.

Mr. H. H. ANDERSON, for appellee.

Per Curiam. Briefs for appellant were filed in this case on October 6, 1888, after they were due, according to the terms of the rule of court. On October 10th the case was reached for argument in its regular order on call of the calendar, and on that day (no oral argument being made and no briefs filed by appellee) a motion was made by appellee to strike appellant's brief from the files for non-compliance with the rule, and to affirm the judgment, which motion was sustained by order heretofore entered. A motion being now made to set aside that order, we have re-examined the question and find that, according to the former practice of the court, a motion to strike appellant's briefs from the files should be made before the case is reached for argument, if they were filed a sufficient time before then to permit the motion to be made. What correction may be necessary to prevent abuses that may arise out of the practice may be matters for future consideration. The former order is set aside and appellee will have fifteen days in which to file briefs.

GEORGE M. FADNER

v.

ALVA C. FILER.

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Embezzlement—Arrest—Trespass—Malicious Prosecution—Evidence—Advice of Counsel—Instructions—Conflict of Evidence—Excessive Damages—Practice—Plea of Justification.

1. Where a person arrested for embezzlement is discharged because of a compromise, and not because of his innocence, there is no foundation for an action for malicious prosecution.

2. In action of trespass on the case for causing the arrest of the plaintiff for embezzlement, the complaint having been made by the defendant upon his personal knowledge, it seems to be doubtful whether evidence that he had information that the plaintiff had been charged with an arrest for larceny, embezzlement or forgery is admissible. It seems that such evidence, if admitted, should have reference to matters of recent date, and that it should have been relied upon.

Fadner v. Filer.

3. Whether the advice of counsel is a complete defense in an action for malicious prosecution is a question for the jury.

4. It is improper to instruct the jury that actual guilt and probable cause must concur to constitute a defense in an action for malicious prosecution.

5. This court will not interfere with the finding of the jury on a point as to which the evidence was conflicting and no instructions were asked.

6. The action of the court in overruling a motion made by the defendant during the trial, for leave to file a plea of justification, must be presumed correct, no plea having been prepared or presented, and there being nothing in the record to show why the motion was overruled.

7. In the case presented, it is *held*: That the verdict for \$8,000 was extravagant and unwarranted, and that it should be set aside, although there was a *remittitur* of \$2,000 by the plaintiff.

[Opinion filed December 7, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action by appellee against appellant for false imprisonment and malicious prosecution. The first count of the declaration charges that on January 10, 1886, the defendant assaulted the plaintiff, seized him, and with violence dragged him about, struck him, and having a revolver, threatened to shoot him if he attempted to leave a certain building, and compelled him to remain there twenty hours; and that on January 11, 1886, defendant assaulted plaintiff, struck him, and forced him to go from said house to a justice court, and then imprisoned plaintiff for twenty-four days. The second count charges an assault and imprisonment for twenty-five days. The third count alleges that defendant falsely, maliciously and without reasonable or probable cause, charged plaintiff with having committed the offense of embezzlement, and on such charge caused him to be arrested and imprisoned for twenty-four days, when plaintiff was discharged, fully acquitted of said charge. The plea was the general issue. On the trial it appeared that on January 10, 1886, and before then, plaintiff was in the employ of defendant as collector. On Sunday, January 10th, Filer went to Fadner's place of business, and was then requested by Fadner to account for and pay over his collections. Filer said the money was in bank, and he would

bring it around the next day. Fadner said he must pay or leave some security. He declined to give security, and Fadner, in the presence of one Myers, locked the door to prevent Filer from leaving. There was evidence tending to show that a number of persons called at the room at different times that night; that, after Myers left, Fadner displayed a revolver and said he would make it hot for Filer if he crossed a certain line, and that he knocked Filer down about 11 o'clock in the evening. During the night, as Filer testifies, he tried several times to get out but was prevented by Fadner. The next morning, on advice of his attorney, Fadner swore out a warrant and procured the arrest of Filer, charging him with embezzlement. He was released on bail the same day, and on February 5, 1886, as shown by the transcript from the justice's docket, he was discharged "upon all the evidence introduced."

There was a verdict for \$8,000 for the plaintiff. Motion for a new trial by defendant. Plaintiff remits \$2000 from verdict. Motion for new trial overruled and judgment for \$3,000, from which defendant appeals.

Messrs. JOHN LYLE KING and ROBERT HERVEY, for appellant.

Mr. JUSTUS CHANCELLOR, for appellee.

GARNETT, P. J. 1. Appellant insists that the plaintiff was discharged by the justice because he paid to appellant, by way of compromise, the amount of money for the embezzlement of which he was arrested, and not because he was found to be innocent. If a person arrested is discharged by means of a compromise and not because of his innocence, there is no foundation for a suit for malicious prosecution. *Emery v. Ginman*, 24 Ill. App. 65.

In this case the transcript of the proceedings before the justice setting forth a discharge on all the evidence introduced, was offered in evidence by the appellee, and oral evidence was given on behalf of appellant tending to prove that the payment by Filer of the demand of Fadner was the moving cause of the discharge. No instructions having been asked

on this point, the most favorable view for appellant that can be adopted is, that there being conflicting evidence as to the cause of the discharge, and the jury having settled the disputed fact in favor of appellee, this court, adhering to well settled rules, must refuse to interfere with that finding.

2. Appellant alleges as error that the court overruled his motion, made during the course of the trial, for leave to file a plea of justification of the imprisonment. No plea was prepared or presented to the court. Had one been presented the court would have committed no error in refusing to allow it to be filed, if it was not a good plea in substance. Nor is there anything in the record to show what appellant proposed to plead. If leave had been given to file such a plea, the plaintiff had the right to know what its allegations were, and until he was informed he could not be compelled to proceed with the trial. The record does not show why the motion was overruled, but we are bound, under the circumstances, to presume the ruling correct.

3. Whether the advice of counsel was a complete defense on the count for malicious prosecution, was a question for the jury, and was fairly submitted by the instruction on that feature of the case.

4. On the trial, defendant, while on the witness stand, was asked by the counsel what information, if any, he had at and prior to the time of the arrest, as to plaintiff's having been theretofore charged with and arrested for the crime of larceny, embezzlement or forgery. Objection to the question by plaintiff's counsel was sustained, and the defendant excepted. Had the question contained a reference to a recent date as the time of the previous charge and arrest, and if the question had been followed by an offer, on the part of defendant's counsel, to prove by the witness that the plaintiff had been, at a previous and reasonably recent date, charged with embezzlement and arrested therefor, and that the defendant had been informed thereof before the arrest complained of by some person whose statement he had reason to believe, and did believe, we are not prepared to say the evidence should have been rejected. Eminent authority maintains the admissibility of such evidence. *Barron v. Mason*, 31 Vt. 189.

What constitutes probable cause, as stated in *Harpham v. Whitney*, 77 Ill. 32, *Bradner v. Faulkner*, 93 N. Y. 515, *Falvey v. Faxon*, 143 Mass., and *Bacon v. Towne*, 4 Cush. 217, seems to support the doctrine of *Barron v. Mason*. If this is the true rule, however, it may be doubtful whether evidence of that character is proper in a case where the defendant made the complaint on his personal knowledge of the facts, and not on information and belief. *Skidmore v. Bricker*, 77 Ill. 164.

Since this question is not necessarily presented in this record and has not been argued by appellee's counsel, we do not wish to be considered as having committed the court to the final adoption of the doctrine of the *Barron* case.

5. The court committed serious errors in the additions made to the third and fourth instructions requested by defendant, and in the alteration of the fifth. By the additions made to the third and fourth the jury were informed, in substance, that actual guilt *and* probable cause must concur to constitute a defense to the count for malicious prosecution.

The fifth instruction, as requested by defendant, was to the effect that if the jury found the defendant had probable cause for instituting the criminal proceedings, the verdict *should* be for the defendant on the count for malicious prosecution. The court changed the word *should* into *may*, so that the sum of these instructions was that if the jury found the plaintiff was actually guilty of the offense charged, *and* the defendant had probable cause for believing him guilty, the verdict on the third count must be for the defendant; but if they only found that defendant had probable cause to believe him guilty, it was discretionary with the jury whether the verdict on that count should be for the defendant or the plaintiff. In this there was manifest error, the universal rule being that probable cause alone is a complete defense to an action for malicious prosecution.

The third instruction given for the appellee is open to the same criticism, referring, as it did, to plaintiff's guilt of "the crime charged in the declaration." We are not inclined to hold that, in itself, is an error of such serious character as to

Aling v. Wenzell.

require a reversal, but think it might be changed with advantage.

The damages awarded by the jury in this case appear to be extravagant and unwarranted by the facts in the record, and though we feel hesitation in interfering with a verdict on a question which is peculiarly within the province of the jury, an element seems to have entered into this finding which can not meet judicial sanction, and with the facts in this case only to rely on, it is our opinion that the remittitur did not remove the vice.

The imprisonment only continued a few hours, and the blow which Filer swears was struck (though Fadner denies it) could not have been serious, as there is no proof that it left a bruise or scratch on the person of appellee, and there is no evidence of any injury arising therefrom. For the errors indicated, the judgment of the Superior Court is reversed and the cause remanded.

Reversed and remanded.

JOHN ALLING ET AL.

v.

WILLIAM T. WENZELL ET AL.

Corporations—Personal Liability of Stockholders—All Subscriptions on Same Basis—Contract with Directors—Claims—Evidence—Costs—Solicitors' Fees—Form of Order of Decree.

1. All subscriptions to the capital stock of a corporation are presumably upon the same basis, all shares being entitled to the same benefits, and subject to the same burdens.

2. Upon a bill to charge the defendants on account of their individual liability as stockholders in a corporation, it is *held*: That the acceptance by the corporation of property of imaginary value, in full payment for one-third of the capital stock, does not enable the holders to throw the entire burden of the debts of the company upon subsequent subscribers who had no notice of the transaction: that a contract for such acceptance made by the directors with two of the four directors, when only four were present, is invalid; that it is no ground of objection that some claims were without

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46	562
27	511
66	322

27	511
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affidavit, that they were justly due, if such claims were sufficiently proved by other evidence; that the book entitled "Claim Ledger," so far as made up in the course of business, is evidence of the indebtedness shown by it; that the belief of a witness is not evidence; that the fund obtained from the stockholders is not chargeable with the fees of complainants' solicitors; and that the order or decree should require the defendants to pay to the receiver the amounts for which they have been found to be liable.

3. The amounts for which the individual stockholders are liable, constitutes a fund from which the expenses of getting it into the hands of the receiver, as well as the claims of the creditors, are to be paid. Such expenses do not include the fees of the complainants' solicitors.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. HUTCHINSON & LUFF, for appellants.

Mr. WALTER M. HOWLAND, for appellees.

GARY, J. This was a bill filed in the Superior Court by the appellees, on behalf of themselves and other creditors of the Papillon Manufacturing Company, against the appellants and others, as stockholders of that company, to enforce their individual liabilities for the debts of the company under Sec. 25 of the Act of 1872, concerning corporations. The capital, \$600,000, was divided into 6,000 shares of \$100 each.

At the organization of the company, 2,000 shares, one-third of the whole, were ordered to be given to Clark and Lotz, the former president and the latter secretary of the company, for the material which they had on hand for conducting the same business (preparation of medicines) for which the company was organized.

The intrinsic value of that property was not very great. Its value to the company might be great, if the business proved successful. One of the appellants, Belding, was an original subscriber to the stock, and one of the first directors, but is not shown to have attended any meeting either of directors or stockholders, and no actual notice of the manner of paying for this stock issued to Clark and Lotz, is shown to

have come to any of the appellants, before they respectively became stockholders, or even before the company became insolvent. Then a bill was filed by appellants Alling, Hibbard and Shepherd, with Dunham and Clark, who are not appellants, all stockholders, to wind up the company, and in that bill this matter was stated. That bill was dismissed and no further notice of it is necessary.

The decree from which the appeal is taken, treats those 2,000 shares as paid up stock, not liable to contribute to the payment of the liabilities of the company. The effect is, to increase the burden upon the other stockholders, if the other 4,000 shares were outstanding, 50 per cent.; but as, in fact, the whole 4,000 shares were not all outstanding, the burden is increased still more. Thus the important question in the case is whether that transaction is valid as against creditors of the company, and other stockholders *pro rata* individually liable to creditors.

Upon the authority of *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, without any analysis of the multitude of cases cited by the parties here, that question must be answered in the negative. The bill in that case was filed by stockholders of the insurance company to compel Cushman and Hardin to assume and discharge the obligations of stockholders in the company. They resisted. They had taken from the company certificates for 5,500 shares in the company and had advanced to the company \$110,000 in money and securities to enable the company to comply with the demand of the State auditors.

It was agreed between the company and Cushman and Hardin that the company should, if Cushman and Hardin required it, take back the stock and return to them what they had given for it. This had been done, and Cushman and Hardin insisted that the transaction was, in fact, a loan by them to the company, with the stock as security, and not a purchase of the stock, and the Supreme Court (p. 454) agreed with them that the real transaction between the parties as intended by themselves, was a loan.

A few extracts from their opinion are so applicable to this case, that no shorter statement of the reason for holding the

stock held by Clark and Lotz to stand on the same footing as other stock, could be made.

"Certificates of stock were issued to them in the usual form, and it so appeared upon the books of the company. * * * Thereafterward, subscriptions to the stock of the company were made to a large amount. The persons thus subscribing had no reason to suspect that the stock taken by Cushman & Hardin stood upon any different footing from that which they received. * * * All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits, and subject to the same burdens. In the subscription of each person every other subscriber has a direct interest. * * * Such a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers; and such agreement will be disregarded, and the party held to all the responsibilities of a *bona fide* subscriber." The records of that company had been destroyed by fire, and there was conflicting evidence whether the contract was spread upon them or not. "But assuming that it was, it would be most unreasonable to hold that the subscribers to the stock of this insurance company, scattered abroad as they were, should be held to be bound by any presumed notice of what was being done by the directors of the company, in the city of Chicago, in matters affecting their interests as such stockholders." "It is supposed by counsel for defendants in error, that it was necessary that the complainants in the court below should have made proof that they were influenced, in subscribing for the stock of this corporation, by this pretended subscription of Cushman and Hardin, and it is said that they have failed in doing so. We see no distinct proof of this. But it must be supposed that they and other subscribers were thus influenced by the amount of the subscriptions which had been made to the stock of the company; a part thereof was this large amount taken by Cushman and Hardin." The phrase, "scattered abroad as they were" in the foregoing extract, does not express a condition upon which was based the unreasonableness of charging subsequent subscribers with notice, by the records of the company, of the

arrangement between the insurance company and Cushman and Hardin, for in Stanhope's case, cited as authority for the proposition, no such element existed. 1 Law Rep. Ch. App. (1865-6) 161.

No comment is necessary to show that in this case an acceptance of property of imaginary value, as full payment for one-third of the stock, does not relieve the holders of it from the obligation to bear with the other, but subsequent subscribers, who had no notice of the transaction, the burden of the debts of the company. Whether stock is taken upon an agreement that it may be returned, and the consideration paid back, or property at fictitious and imaginary values taken as payment therefor, can make no difference to a subsequent subscriber, who has a right to assume that the assets of the corporation available to meet its obligations have been, or will be, as much increased by each share issued to other holders, as by one to himself.

To what extent the views of the Supreme Court in the Lamar Insurance Company case, when followed in this, will affect Nourse, Hoit and Zuber, has not been argued on this appeal, and is left undecided.

There is another reason why Clark and Lotz can not be treated as holders of full paid shares. Clark had just been elected president and Lotz secretary and treasurer of the company. They were original subscribers for, and acted as representatives of, more than two-thirds of the capital of the company, and their subscriptions then stood for 2,191 $\frac{1}{2}$ shares each. The board of directors consisted of five persons, of whom they were two, and only four were present. Their votes, or the vote of one of them, was necessary to make a majority. They had no authority to bind the company to any contract made with themselves personally. The cases to this effect are too numerous to cite; a multitude of them are collected in Note 1 to Sec. 517, Morawetz on Corp., 2d Ed.

Their action attempting to charge the company with the receipt of what they gave for the 2,000 shares, as full payment, is not binding upon the company or other stockholders, though in stating the account they are entitled to credit for the value of the property received by the company.

There are some minor questions which will not be discussed in detail. Some claims are objected to because they were not accompanied by an affidavit that they were justly due. This is not a reason for rejecting the claims if they are sufficiently proved by evidence. The object of the affidavit is to prevent the presentation of fictitious claims, and is required by mere usage in the course of business, and not by any rule established by law in chancery proceedings, though it is in administration of estates of deceased persons. Secs. 60 and 64, Chap. 3, R. S. 1872. Still, no claim which is objected to can be allowed without an affidavit, unless supported by such evidence as would entitle the party to recover upon it in an ordinary action. 1 Barb. Chy. Pr. 521-2; 2 Dan. Chy. Pr. 1209.

The book entitled "Claim Ledger," Exhibit C, so far as it was made up in the course of business, while the company was carrying on a regular course of business, is evidence of whatever indebtedness of the company is shown by it. *Dows v. Naper*, 91 Ill. 44.

Entries made after the company stopped business, whether under the direction or by an employe of the receiver, or by any other person, are not evidence of such indebtedness. But if such entries in that book were made from other books or papers of the company which had been made in the ordinary course of business of the company, those other books or papers may, probably, be competent evidence. The necessity which sometimes arises in jury trials, of using schedules for summarizing voluminous accounts already in evidence, could hardly occur before a master. See *B. & W. R. R. v. Dana*, 1 Gray, 83.

As to Zuber's testimony, his belief is not evidence; only such knowledge as he had upon the subject is admissible.

The individual liability of stockholders is a fund from which the creditors are to be paid. The necessary expenses of getting this fund into the hands of a receiver are properly added to the debts to be paid, as they are a charge upon the fund, so that the creditors may be paid in full. But the expense to the complainants of presenting their case to the

court, or of the several creditors of proving their claims before the master, are not, except so far as such expense is taxable as costs under the statute, a charge upon the fund, and therefore should not be included. So, while compensation to the master for his services, as well as to the receiver for his, are properly included, there should be allowed to the receiver for his expenses for solicitor's services, only what is a fair compensation for such service as aided the receiver in getting the fund together, ascertaining who were to contribute to it, and the respective amounts of the contributions. It would seem that this labor would be substantially performed, first, by the complainants bringing the stockholders into court as defendants, and establishing the fact that they were stockholders, and of how many shares, and what amount was unpaid thereon, either by their answers or by evidence; and, second, by calculations made by the master, after all the proof of debts was in. Or, in many instances, the master might make the inquiry as to how many shares, and how much unpaid thereon, the several stockholders were liable for. But under color of expenses of the receiver, the complainants and creditors at large are not entitled to the services of a solicitor gratis.

The proper order or decree, after the amount for which a stockholder is liable is ascertained, is that he pay it to the receiver. For non-compliance with such order or decree, the ancient remedy was attachment of the person. 2 Dan. Chy. 1046. But this remedy is not admissible here. *Goodwillie v. Millimann*, 56 Ill. 523. Under Sec. 47 of the Chancery Act an execution issues, and it is not irregular that such execution should recite the decree and command the sheriff to collect and pay to the receiver the money found by the decree to be payable by the stockholders to the receiver.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

NORTH CHICAGO CITY RAILWAY COMPANY

V.

JOHN GASTKA.

Personal Injuries—Street Cars—Newsboy—Trespass—Negligence of Conductor—Action for Damages—Instructions—Permanent Injury—Probable Damages—Preponderance of Evidence—Reference to Declaration.

1. Although the conductor of a street car has implied authority to keep trespassers off the car under his control, he is bound to have due regard for life and limb. His employer will be held to a strict accountability for any reckless or wanton abuse of his authority.

2. In an action to recover damages for a personal injury, it is proper to instruct the jury that, in estimating the plaintiff's damages, they may take into consideration the permanent character of the injury, although there is no averment of permanent injury contained in the declaration. Nor can the defendant object that such an instruction leaves the jury to find damages for the probable effect of the injury.

3. In the case presented, an instruction touching the preponderance of the evidence and credibility of witnesses, is approved by this court.

4. It is proper in an instruction to refer the jury to the declaration for a statement of facts necessary to charge the defendant with liability.

5. On a motion for a new trial based on the absence of witnesses who had been subpoenaed, the failure of the party calling them to show whether such witnesses absented themselves by his consent, is sufficient ground for refusing a new trial.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Appellee brought an action on the case against appellant, in the court below, to recover for a personal injury sustained by him by being run over by a street car owned by appellant, and operated by it on North Clark street, in the city of Chicago. The declaration as amended contained three counts. The first count alleged that on the 18th day of August, 1885, appellee was riding on a street car of appellant drawn by horses, which were under the care of servants of appellant, who were

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North Chicago City Ry. Co. v. Gastka.

driving the same along a certain street car track owned by appellant; and while appellee, with all due care, was lawfully riding on such car, appellant, by one of its servants, violently, negligently and wilfully laid hands upon appellee, and negligently and wilfully, with great force and violence, threw him from said car and under the feet of horses then drawing another car of appellant in an opposite direction; and the last named car and horses ran over the body of appellee, and he was thereby greatly bruised, hurt and wounded, and was obliged to, and did, spend five hundred dollars in endeavoring to be cured, and by means of the premises appellee became sick, lame and disordered, and so remained, hitherto; during all which time appellee was prevented from transacting his business, and was deprived of divers gains and profits which he otherwise would have made.

The second count differs from the first one in no material respect, except that it alleges that the servants of appellant violently, negligently and unlawfully, pushed, jostled, cast and threw appellee, and then and there caused to be pushed, jostled, cast and thrown, with great force and violence, appellee off the car upon which he was riding, under the feet of the horses drawing a car in the opposite direction, etc.

The third count differs from the second only in respect that it avers that for a long time previous to the injury in question, newsboys were accustomed to go upon the cars of appellant to sell newspapers to passengers thereon, with the knowledge, consent and approbation and without the objection of appellant, and appellee as such newsboy, on the day mentioned, boarded the car of appellant for the purpose of selling newspapers to passengers who had taken passage upon it; and while appellee was lawfully upon such car and in the exercise of due care, appellant, through its servants, without notice to appellee and without warning to him to get off the car, violently, negligently and unlawfully cast and threw him to the ground with great force and violence, and that another car of defendant, drawn by its horses moving in an opposite direction, then and there ran over his body and legs, and by reason thereof divers of his bones were broken, and his legs were crushed,

VOL. 27.]

North Chicago City Ry. Co. v. Gastka.

continued, mangled, lacerated and broken, and he became and was sick, sore, lame and disordered, and so remained from thence hitherto, etc.

The case was tried below with a jury, in December, 1887, and the jury found a verdict for appellee, assessing his damages at \$3,000.

The lower court overruled the motion of appellant for a new trial, and rendered judgment on the verdict, and this appeal is from that judgment.

Messrs. MUNROE & GEER and W. C. GORDY, for appellant.

Even if a servant is engaged in the performance of his duty to his master, yet, if he, personally and wholly for a purpose of his own, does an act not connected with the business of such master, and not intended by him to further the objects of such employment, the master is not liable for an injury thereby occasioned. *Cooley on Torts*, page 535; *Johnson v. Barber*, 5 Gilm. 425; *Tuller v. Voght*, 13 Ill. 277; *Oxford v. Peter*, 28 Ill. 434; *Wharton on Neg.*, Sec. 168.

"A railroad company is not liable for assaults committed by its servants on a person who is not in any sense a passenger, although it is otherwise as to passengers." *Wharton on Neg.*, Sec. 168; *Porter v. R. R.*, 41 Iowa, 358.

"Where a servant," says Lord Kenyon, "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." *McManus v. Crickett*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343.

"If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending to execute it, does an injury to another, not within the scope of his employment, the master is not liable." *Howe v. Newmarch*, 12 Allen, 49.

If the servant, even while engaged in the service of the master, do a wrongful act not within the scope of his employment, from motives of malice or wantonness, the master will not be liable, for it would be an abandonment of the business of the employment. *Johnson v. Barber*, 5 Gilm. 425.

North Chicago City Ry. Co. v. Gasika.

“ At the common law, the master is not liable for the wilful trespasses of the servant which are not committed in furtherance of the business of the master. *Tuller v. Voght*, 13 Ill. 278.

It has been held by courts of the highest respectability that the wilful and malicious throwing of a passenger from the car by the conductor of a street car, is not an act done in execution of the duty of a conductor to his employer, and that the street car company is not liable therefor. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *Passenger R. Co. v. Donahue*, 70 Penn. St. 119; *McKeon v. Citizens R. Co.*, 42 Mo. 79.

“ A newsboy selling newspapers on the street, and accustomed to board street cars, with the acquiescence of the servants of the company, for the purpose of supplying the passengers with papers, is not a passenger, and the company is not charged with the duty of looking after his safety, or of seeing that he does not run into danger, or of stopping the speed of the car for him to leave, whether requested to do so or not.” *Thompson on Car. of Pass.*, p. 46; *Fleming v. Brooklyn R. Co.*, 1 Abb. N. C. 433; *Blackmore v. Toronto Street R. Co.*, 38 U. C. Q. B. 172.

The first instruction attempts to give to the jury the elements that enter into the determination of the question of the preponderance of evidence. It should, therefore, give all of the elements entering into the question, and, if it does not, it is erroneous. *Whitaker v. Parker*, 42 Iowa, 588; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 213; *City of Greenville v. Henry*, 78 Ill. 151.

That the instruction omits to mention several important elements involved in the proper decision of the matter is apparent. It makes no mention of the interest or the intelligence of the witnesses, the reasonableness or unreasonableness, probability or improbability of their statements, or the consistency or inconsistency of their testimony. It is confined wholly to the two elements of the appearance of the witnesses, and their opportunity of knowing the facts.

It is the established rule in this State, that, in a case where the evidence is conflicting, unless every instruction given to

the jury of the various elements necessary to be considered by them in determining the credibility of the witnesses, and the consequent preponderance of the evidence. There is no such attempt at enumeration to be found in the instruction. In effect, the jury are hereby directed to consider all the circumstances under which the several witnesses testified, for the purpose of arriving at a correct conclusion as to their credibility. The appellant, if not satisfied with the general statement of the law, should have asked an instruction designating more specifically the points which should be treated as the basis of the finding in this respect. A similar instruction, in substance, was approved in *Johnson v. Whidden*, 32 Me. 230.

Exception is also taken to the clause in the instruction which charges that "the plaintiff must satisfy you by what is called a preponderance of the proof that the wrong complained of was committed by the servant of the defendant, *in manner and form as charged in the declaration*." The declaration contains a full statement of the facts necessary to charge the appellant with liability, and no error is committed in thus referring the jury to that source for information. *O. & M. Ry. Co. v. Porter*, 92 Ill. 438; *Ladd v. Pigott*, 114 Ill. 654.

The case presented by either count of the declaration is not based merely upon negligence, but upon great force and violence, in the first and second counts, and in the third upon great force and violence without any warning to appellee. Referring to either count for the facts necessary to a recovery, the jury could not, as contended for appellant, have found appellant guilty, if its only fault had been the slightest degree of negligence. The instruction was as favorable to appellant as the law requires. The conductor of a street car, having implied authority to keep trespassers off the car under his control (*Thompson on Carriers of Passengers*, 369), still must have a due regard for life and limb, and should be held to a strict accountability for any reckless or wanton abuse of his authority. *Railway Accident Law* (*Patterson*), Sec. 198; *Pierce on Railroads*, 330.

At the conclusion of the evidence of appellant, but before it rested its defense, the attorney for appellant informed the

court, that appellant had subpoenaed Bohn and Burda as witnesses in the cause; that they had been present in the court house during the trial on the day before, and on the then present day of the trial; that, because of the order of the court excluding the witnesses from the court room, during the trial, Bohn and Burda had not been in the court room, but had kept outside of it, and in the room of the court house assigned to the witnesses in said cause while waiting to testify, and when they were wanted for examination, they could not be found; and appellant moved the court to give it time to produce such absent witnesses; but the court, after waiting for that purpose for not over fifteen minutes, the witness not appearing, refused to wait longer, and required the appellant to at once proceed with the trial, which was done, without the evidence of such witnesses.

On the motion for a new trial affidavits were read in evidence showing the facts above stated; and the materiality of the evidence which Bohn and Burda would have given, if time had been allowed to secure their attendance. Without passing on any other question presented by this point in the motion for a new trial, we must rest contented with the observation that none of the affidavits state whether or not the witnesses absented themselves by consent of appellant, and the failure to make that fact appear was good ground for disregarding the point.

Inspection of the evidence fails to convince us that the jury was influenced by passion or prejudice in arriving at their verdict, or that the finding is manifestly against the weight of the evidence. The judgment is affirmed.

Judgment affirmed.

GARY, J., took no part in the decision of this case.

CITY OF CHICAGO
V.
PATRICK FARRELL.

Municipal Corporations—Personal Injury—Defective Sidewalk—Constructive Notice—Instructions.

In an action against a municipal corporation to recover damages for personal injuries, alleged to have been caused by negligence in failing to have a guard or rail on a sidewalk adjoining a bridge, this court affirms the judgment for plaintiff, it being admitted that the evidence tended to show constructive notice, and the instructions asked by the defendant and refused by the court having failed to present a sound hypothesis upon which to base a verdict for the defendant.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. CLARENCE A. KNIGHT and JOHN W. GREEN, for appellant.

Messrs. WILLIAM HOYNES and JOHN GIBBONS, for appellee.

Per Curiam. This suit was brought by appellee against appellant, to recover damages for personal injuries caused by the neglect of appellant in failing to have a guard or rail placed on a sidewalk on Archer avenue adjoining a bridge over Ogden slip, in said city. By reason of the absence of such guard at the time of the injury, appellant fell from the sidewalk in such a way that his leg was caught in some timbers and broken; the result being that it was found necessary to amputate the limb.

On a trial before the court below and a jury, a verdict was found for appellee, motion for new trial by appellant was overruled, exception taken by appellant, and judgment on the verdict, from which this appeal was prayed and allowed.

Northrop v. First National Bank of Chicago.

There was a conflict of evidence as to the length of time the guard had been missing from the sidewalk at the time of appellant's fall, but counsel for appellant admits that, upon the whole record, there was evidence tending to show, it was down for a time sufficient to have given the city constructive notice thereof. This disposes of the question of fact in the case.

The instructions requested for the city and refused by the court, each failed to present to the jury a sound hypothesis upon which a verdict for the defendant could rest. There was no error in the refusal of such instructions, and the judgment will have to be affirmed.

Judgment affirmed.

GARY, J., took no part in the decision of this case.

CLARK T. NORTHROP ET AL.

V.

THE FIRST NATIONAL BANK OF CHICAGO.

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Warehouse Receipts—Quasi Negotiable Character of—Secret Lien—Transfer without Notice—Replevin—Other Securities.

1. Warehouse receipts issued by others than those designated by the statute as public warehousemen, have a *quasi* negotiable character.
2. The assignee of such a receipt without notice is not bound by a verbal arrangement between the parties, touching a claim of the party holding the property.
3. In an action of replevin by the assignee of such receipt, the fact that the plaintiff holds other securities can not be urged in defense.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

In the latter part of 1885 or the early part of 1886, appellants, dealers in hides, tallow, etc., at 131 and 133 East Kinzie Street, Chicago, sold to James Smibert 227 hides and received

VOL. 27.] Northrop v. First National Bank of Chicago.

from him payment therefor. The purchaser not wishing to remove the hides at that time, it was arranged that they should remain at appellants' above named place of business a few days. Sometime after that Smibert wanted to buy some tallow of appellants on credit, which they at first declined to sell except for cash. Smibert then said to them that those hides were in their cellar and they (appellants) were safe enough. Thereupon they sold and delivered the tallow to him on credit, and have never been paid the price thereof. Afterward, and on January 21, 1886, appellants issued and delivered to Smibert a warehouse receipt as follows:

"CHICAGO, January 21st, 1886.

"Received in stores Nos. 131-133 East Kinzie street, for account of James Smibert, the following merchandise: 227, No. 1 green salted steer hides, subject to storage of 2 cents per hide per month; deliverable only on surrender of this receipt.

"C. T. NORTROP & Co."

That receipt was indorsed and pledged in January or February, 1886, by Smibert to appellee, for an actual loan of money then made by it to him, amounting to about \$1,700, which has not been paid.

The note given by Smibert for that loan was subsequently renewed, and other loans were made to him by the bank, making his aggregate indebtedness to the bank on June 18, 1886, and at the time this suit was brought, about \$11,000, for all of which he agreed the hides should be held as security. The bank had no notice of the verbal arrangement between Smibert and appellants until July 30, 1886. On July 17 and 30, 1886, appellants made other advances to Smibert, for which he agreed with them that they might hold the hides as security. The loans by the bank remaining unpaid, its attorney demanded the goods of, and tendered the storage to, the appellants; the tender was refused and appellants declined to deliver the goods. Thereupon appellee brought this action of replevin for the hides and the same were delivered to it by the sheriff. The jury found property in the bank. Motion

Northrop v. First National Bank of Chicago.

for a new trial by defendants overruled and exception. Judgment on verdict. Defendants appeal.

Messrs. BURKE & HOLLETT, for appellants.

Mr. ORVILLE PECKHAM, for appellee.

GARNETT, P. J. The *quasi* negotiable character of warehouse receipts was judicially recognized long before the act of the legislature of this State for the regulation of public warehouses was passed. Prior to that time the principle applied by the courts was, that the delivery of warehouse receipts is a symbolic delivery of the property itself, and that it has the same effect as the delivery of the property and can have no greater, and that a transfer of the warehouse receipt, by the person in possession of it, gives no higher title than would the transfer of the property by the same person. *Burton v. Curyea*, 40 Ill. 320. And in the notes to *Lickbarrow v. Mason*, *Smith's Leading Cases*, Vol. 1, Part 2d (7 Am. Ed.), 1197, it is said that "the exigencies of trade have called a class of instruments into being, which are, substantially, acknowledgments by public or *private* agents, that they have received merchandise, and from whom or on whose account, and usage has made the possession of such documents equivalent to the possession of the property itself; and to this class belong warehouse receipts." There are numerous authorities bearing more or less directly upon the question presented here, and among them the following: *Broadwell v. Howard*, 77 Ill. 305; *Western Union R. R. Co. v. Wagner et al.*, 65 Ill. 197; *Chicago Dock Co. et al. v. Foster et al.*, 48 Ill. 507; *Canadian Bank v. McCrea*, 106 Ill. 281; *Mida v. Geissman*, 17 Ill. App. 207; *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553; *Spangler v. Butterfield*, 6 Col. 356; *Durr et al. v. Hervey*, 44 Ark. 301; *Fourth Nat'l Bank v. St. Louis Cotton Com. Co. et al.*, 11 Mo. App. 333; *State v. Bryant*, 63 Md. 66; *Hale et al. v. Mil. Dock Co.*, 29 Wis. 482; *Griswold v. Haven*, 25 N. Y. 595; *Second Nat'l Bank v. Walbridge et al.*, 19 Ohio St. 419; *Gill & Co. v. Frank*, 12 Oregon, 507; *Soloman v. Bushnell*,

11 Oregon, 277; Benjamin on Sales (2 Am. Ed.), Sections 815-823; 2 Daniel on Neg. Inst. § 1713; Planter's Rice Mill Co., v. Merch. Nat'l Bank of Savannah, 3 S. E. Rep. 327.

Conceding this array of authority "speaks a various language" on the question under discussion, as well as on other kindred and closely allied questions, we think the current of opinion in this country supports the doctrine of the note to Smith's Leading Cases, quoted above. That such is the rule adopted in this State, and that warehouse receipts issued by private agents or by warehousemen, other than those described as public warehousemen, are placed on the same footing as bills of lading, in respect to their *quasi* negotiable character, we have no reason to doubt. If that be true, the case of Western Union R. R. Co. v. Wagner et al., *supra*, must be held to control the case at bar. In that case the vendor of the goods delivered them to the railroad company and authorized the railway agent to issue a bill of lading to the vendee, with the verbal agreement between vendor, vendee and the railway agent that the property should not, in fact, be shipped, until the residue of the purchase money should be paid. The bill of lading was issued and placed in possession of the vendor, and he then handed it to the purchaser, one Hewitt, who, without notice of said verbal agreement, advanced to the vendee the value of the property on the pledge of the receipt. The court held that the document might be regarded either as a bill of lading or a warehouse receipt, but that in either case, the vendee was placed in possession of the property, so far as third persons knowing nothing of the verbal arrangement might become interested; that such verbal arrangement was not of the slightest avail against Hewitt.

The position of appellants here is not more favorable than that of the vendor in the Wagner case. The receipt to Smibert was issued after the first advance made to him by appellants. They might have provided in the receipt for their own protection, had they so desired, and unless they intended to waive the benefit of the lien for advances which Smibert had consented to, it was culpable negligence on their part to issue a receipt which is commonly regarded as representative of the

KOLB v. KLAGES.

property, without any mention therein of any claim except for storage.

Appellee held other securities which appellant insists should have been exhausted before it is allowed to resort to the property covered by the warehouse receipt. That suggestion may possibly be listened to in a court of equity, but in this suit at law it is of no force.

There was no error in the instruction given for the plaintiff. The judgment is affirmed.

Judgment affirmed.

PHILIP KOLB AND ADAM KOLB

v.

ALBERT KLAGES AND LOUIS KLAGES.

Dogs—Injuries Inflicted by—Action for Damages—Evidence—Instructions—Remittitur.

1. In an action to recover damages for injuries alleged to have been inflicted by a vicious dog, it is not necessary to a recovery to show that the defendant knew that the dog had bitten some other person. It is sufficient to show that he had knowledge that it had shown a disposition to bite or attack others.

2. In the case presented it is *held*: That evidence tending to show what made the dog savage, though improperly admitted, could not have injured the defendant; that there is no error in the instructions, nor in requiring a *remittitur*.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. ELBRIDGE HANEY, for appellant.

Messrs. CAMERON & HUGHES, for appellees.

MORAN, J. This action was brought to recover for injuries

alleged to have been inflicted on appellee, a minor, by a vicious dog kept by appellants.

Another action was brought by Louis Klages, the father of appellee, to recover for the care, nursing and expenses for medical attendance made necessary for him to expend in curing his said son of the injuries received from said vicious dog. Both cases were, by agreement of the parties, submitted to the same jury, with the instructions that a verdict should be rendered in each case, which was done, the verdict in favor of appellee being for \$800, and that in favor of Louis Klages for \$100. Judgment was entered by the court on the verdict in favor of appellee, but a *remittitur* of \$25 from the verdict of \$100 was required to be entered, and on that being done, judgment was also entered on that verdict as so reduced.

Appellants have brought both the cases to this court, and they have been submitted and considered together as they involve the same questions.

Appellants insist that it was not proved that they knew the dog was vicious; that it is not shown that he bit any other person. It is not absolutely necessary to a recovery that the evidence shall show that the owner of the dog knew that the dog actually had bitten some other person, in order to make him liable. It is sufficient if the evidence shows that the keeper knew the dog had shown a disposition to bite or attack others. Evidence was before the jury which warranted the inference by them that the dog was of a savage and ferocious disposition, and the appellants knew that fact. *Flangsborg v. Basin*, 3 Ill. App. 531; *McCaskill v. Elliott*, 5 Strobbart, 196.

Counsel for appellants contends that errors were made by the court in admitting and rejecting evidence. We have examined the record with reference to such alleged error, and we are of opinion that there is no material error shown. One of the objections is that the court allowed it to be shown that the dog was kept tied in the barn close to a pile of raw hides, and that a witness was allowed to state as his opinion that such proximity to the hides would have a tendency to make the dog savage.

It is not material what it was that tended to make the dog

Hayden v. Hoxie.

savage, and therefore the opinion should not have been admitted; but as there was evidence of the actions of the dog evincing his disposition, which was proper, material and sufficient, we can not treat the improper admission of the said opinion as reversible error.

General complaint is made by appellants of the instructions given for the plaintiff, but counsel has not specified in the brief the points in which said instructions are erroneous, and the refusal and modifications of defendants' instructions by the court is treated by the counsel in his brief in the same manner. We have carefully examined the action of the court with reference to instructions, and we have found no error in that respect.

It is well settled practice in this State to enter judgment in cases sounding in damages, after requiring the plaintiff to remit from the verdict rendered by the jury, and while such *remittitur* will not always be regarded by the reviewing court as removing all vice from the verdict, yet it will, as a rule, sanctify it. *Thomas v. Fisher*, 71 Ill. 576; *McCausland v. Wonderly*, 56 Ill. 410.

No error by the trial court has been made to appear on this appeal, and the judgment must therefore be affirmed in both cases.

Judgment affirmed.

HARVEY S. HAYDEN ET AL.

V.

A. J. HOXIE ET AL.

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Sales—Action for Alleged Balance—Evidence—Use of Memoranda to Refresh Recollection of Witness—Conditions—Instructions.

1. A writing made, to preserve the memory of a fact, in the presence of the witness who then knew and verified its accuracy, may be used to

refresh the recollection of such witness if he can not, without it, testify as to such facts.

2. Unless the necessity for the use of such memoranda is made to appear by the testimony of the witness himself, it is not error to refuse to admit them.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. ALLAN C. STORY, for appellant.

Messrs. FRANK J. SMITH & HELMER, for appellees.

GARY, J. This was an action for the balance claimed to be due for lumber sold by appellees to appellants, and which they had received and disposed of. The sale was in Wisconsin, at \$10 per thousand feet, on the cars. There was no explicit agreement between appellants' agent and one of the appellees, between whom the bargain was made, as to inspection before loading, but there was conversation which implied that the appellees would have it properly done, and only ship such as would pass as "common or better," and yet the agent of the appellants testifies, "I did not intend to take his (meaning one of the appellees) inspection; I did not calculate to." This intention was not disclosed at the time of the bargain.

There is no question in the case as to the quantity, only as to the quality, of the lumber shipped, and if there were, the record does not sustain the statement in the abstract and the complaint in appellants' brief, that one of the appellees, in testifying to the quantity, read from a copy of a statement rendered to the appellants when one of the appellants was on the stand. The abstract prepared by appellants shows the matter of which they most complain, thus:

"Am in hard wood lumber business, and have been so engaged for about four years; have inspected and understand inspecting same. During winter of 1885-6 we received four cars of lumber from Hoxie & Mellor. There were three grades of it—firsts and seconds, or first and second class, 'common,' and 'mill culls.'

Hayden v. Hoxie.

"Q. Have you any memorandum, or are you able to say how much there was of each quality? A. I have, in the memorandum, not as firsts and seconds as distinguished from common, but firsts and seconds, and common, as lumber was bought.

"Objected to by plaintiffs' attorney.

"THE COURT: Without the witness made the memorandum himself at the time, he can not use it. (Exception by defendants.)

"About half of it was 'common and better,' and the balance 'culls' and 'mill culls.'

"Q. Have you any memorandum made at the time which will show accurately the amount of each? A. Our records taken at the time show.

"Q. Were they made in the usual course of business? A. Yes, sir.

"Plaintiffs' object to the memorandum being used. Objection sustained and exception by defendants.

"Q. As you inspected it, what was done by way of keeping a memorandum? A. A record was entered in our books, and the cull and mill cull was piled separately, and kept separately by itself.

"Q. Who kept the record? A. It was kept by our bookkeeper.

"Q. How did he keep his record? Who called it off?

"THE COURT: There is no use in following that up, because without the party made a memorandum he can not testify any further about that.

"MR. STORY: Suppose one handles the lumber and decides what there is, and directs another man to put it down.

"THE COURT. Your record would not go in evidence then. Without he made a memorandum of it at the time you can not even use it.

"Exception by defendants.

"Q. Did you see one made at the time and as the lumber was inspected? A. I did.

"Q. Did you direct it, and do you know whether it is accurate or not?

"A. I know it was accurate, and I gave instructions to that effect.

"Q. So you verified it as the inspection proceeded?

"A. Yes, sir.

"Q. Have you the original memorandum here that was made? A. Yes, sir.

"THE COURT: Without he made it himself, there is no use taking up any time with it.

"Exception by defendants.

"Q. I hand you some papers and ask you if you can identify from those the memorandum you have referred to. A. There are four of them here, embracing the record of the stock as we unloaded it from the four cars. They are such as I identified and approved at the time they were made.

"Q. What do you say as to their being correct at that time?

"A. They are correct; and I so verified them at that time. I identify them now as the ones then made.

"Q. I ask the witness to refresh his memory from them.

"Objected to by plaintiffs. Objection sustained, and exception by defendants.

"Q. Examine the papers which you have just identified and referred to, and state, if you can, after such examination, exactly what the amount was of each quality of lumber you saw inspected from those four cars.

"Objected to by plaintiffs. Objection sustained, and exception by defendants.

"Show memoranda, marked 1, 2, 3 and 4, offered in evidence by defendant, and excluded by the court. Exception by the defendants. Said memoranda show the quantity and quality of said lumber as per inspection by Harden Bros.

"The value of mill culls in Chicago would be nothing; of culls about nine dollars at that time.

"Fully one-half of the four cars of lumber, other than the 'common and better,' was either mill cull or cull, about the same quantity of each."

The law is that a writing is admissible in evidence in all cases where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it, if, at the time

Hayden v. Hoxie.

of testifying, he can recollect nothing further than that he had accurately reduced the whole transaction to writing. Note 1 to Sec. 437, 1 Greenl. Ev. This is a rule of common sense, and it can make no difference in principle, whether the witness made the writing himself, or was present at the making of it, and then knew and verified its accuracy. *Flynn v. Gardner*, 3 Ill. App. 253.

But it is a part of the rule that the witness can not, without the writing, tell the matter to be proved by the writing; and in practice the same result is often attained by "refreshing the memory" and permitting the witness to read, without putting in evidence, what he once knew and wrote or verified as true, and if then he remembers the facts, he is permitted to testify to what he had forgotten. Case last cited. But until it is shown by the witness' own testimony that his memory needs the aid of memoranda to refresh it, there can be no recourse to them. *Young v. Catlett*, 6 Duer, 437; *Sanders v. Hutchinson*, 26 Ill. App. 633.

The necessity of some mode of proving details of arbitrary and isolated facts, which no memory can carry, and which no association of ideas can recall, is the foundation of the rule, and until the necessity appears, the rule does not apply. It is true, it may be implied from the testimony of the witness—"about half of it was common or better, and the balance culls and mill culls; fully one-half of the four cars of lumber, other than the common or better, was either mill cull or cull, about the same quantity of each"—that he did not recollect with exactness the respective quantities, but he nowhere says that he did not, nor was he asked whether he did or not. If the court had admitted the memoranda in evidence, it could hardly have been said to be error, but it was not error to refuse to admit them, so long as the necessity was not made expressly to appear. And the appellant lost nothing by not being permitted to put them in. The appellees put in the appellants' statement as to the first three car loads, and if the jury (as they did) paid no attention to them, how were the appellants injured by the exclusion of the fourth? *Luke* 16, 31.

The instructions fairly put to the jury the question for them to decide.

VOL. 27.] Am. Exch. Nat. Bk. of Chicago v. Chicago Nat. Bk.

They were told, in effect, that if the lumber was of the quality agreed upon, the appellants must pay for it; if not, they should, as to the portion inferior, pay only what it was worth, less their expenses upon it.

There is no error and the judgment is affirmed.

Judgment affirmed.

THE AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO
V.
CHICAGO NATIONAL BANK.

Banks—Action on Checks—Review of Evidence—Presentation for Payment—Stoppage of Payment.

1. In an action on a check drawn on the defendant bank in favor of a third party and by him deposited in the plaintiff bank in the usual course of business, after the defendant had refused to certify it, upon a review of the evidence, it is *held*: That the defendant was in funds with which to pay the check when it was presented; and that certain drafts and a letter of credit were then treated by the defendant as being to the credit of the drawer.

2. It *seems* that the presentation of the check to the defendant's cashier before the opening of the bank and his statement that payment had been stopped and that it would not be paid if tendered for payment, rendered further presentation unnecessary, the rights of the parties being fixed by the condition of the drawer's account at that time.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. SWIFT & CAMPBELL, for appellant.

There were not sufficient funds to the credit of the drawer of this check to pay it when presented for payment. In this State a check is such an assignment as enables the drawee to maintain suit in his own name against the bank on which the

check is drawn, if sufficient funds are at the credit of the drawer when the check is presented for payment. *Munn v. Burch*, 25 Ill. 35; *Bank of America v. Indiana Banking Co.*, 114 Ill. 483. The delivery of a check by the drawer to the drawee fixes the rights of the latter against the former, but as against the bank on which the check is drawn, presentation for payment is necessary to fix the rights of the drawee. *Shaffner v. Edgerton*, 13 Ill. App. 137; *Fourth National Bank v. City National Bank*, 68 Ill. 398. This presentation for payment must be made in banking hours. *Bickford v. First National Bank*, 42 Ill. 244. The check in suit was not presented for payment at the interview which took place between Mr. Blount, the messenger of appellee, and the cashier and assistant cashier of appellant, before ten o'clock upon the morning of June 15th. As to the request for certification, if any such request was made by Mr. Blount, it is unnecessary to say that the American Exchange Bank was under no obligation to certify. The holder of a check has no right to demand from the bank anything except payment. Certification is a mere matter of accommodation, and it is entirely at the option of the bank to certify or not. *Daniel on Negotiable Inst.*, Sec. 1601. The fact that appellant stamped the check "payment stopped" does not prevent its availing itself of the defense of want of funds.

"The rule is well settled that unless the representation of the party to be estopped has also been really acted upon, the other party acting differently, that is to say, from the way he would otherwise have acted, no estoppel arises." *Bigelow on Estoppel*, p. 549; *Hefner v. Vandolah*, 57 Ill. 520; *Ball v. Hooten*, 85 Ill. 159.

"It is also well established that in order to the estoppel there must have been knowledge, actual or constructive, by the party making the representation, that the other party intended at the time to act upon it." *Bigelow on Estoppel*, p. 529; *Andrews v. Lyons*, 11 Allen, 349.

The *onus* is upon appellee to show it has been injured or prejudiced because appellant assigned as a reason for non-payment that payment had been stopped, instead of assigning as a

VOL. 27.] Am. Exch. Nat. Bk. of Chicago v. Chicago Nat. Bk.

reason that there were no funds, or (as it had a right to do) failing or refusing to assign any reason whatever. *Althorp v. Beckwith*, 14 Ill. App. 628.

The giving of a wrong or even a false reason for an act, does not prevent the party from afterward availing himself of the true reason. *Lynch v. Stone*, 4 Den. 356; *Smith v. Douglass*, 4 Daly, 191.

"Mere acquiescence or waiver without consideration is not binding if a change of purpose will not affect the rights of others." *Bigelow on Estoppel*, p. 568; *Ripley v. Ætna Insurance Company*, 30 N. Y. 136, 164.

The bank was certifying checks of *Kershaw & Co.* when this check was presented under a special agreement which provided that this particular check should not be paid. Not only was the bank, therefore, at liberty to refuse payment of this check, but it was its duty to refuse. *First National Bank v. Pettit*, 41 Ill. 492.

The drawer of the check had a right to stop payment as against the drawee, and appellee stands in no better position. This check was given upon June 13th to correct an error in a previous check. It does not appear that it was presented at all until the afternoon of June 14th, when it was presented for certification, and not for payment. Meanwhile the drawee had failed, owing the drawer \$100,000, so that the drawee could not have maintained any action against the drawer for this \$10,000. Appellee took the check with notice that the American Exchange had refused to certify it, and appellee has never placed it to the credit of the drawee, and has never paid any consideration for it.

MESSRS. TATHAM & WEESTER and MILLARD & SMITH, for appellee.

The rule in this State, established by a long line of decisions, is that when a depositor draws his check on his banker, such check operates to transfer the sum therein named to the payee, provided the depositor has on deposit a sufficient sum to pay the check at the time it is presented for payment. *Munn v. Burch*, 25 Ill. 21; *Marine Bank of Chicago v. Ogden*, 29 Ill.

248; *Brown v. Leckie*, 43 Ill. 497; *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Merchants Nat. Bank v. Ritzinger*, 20 Ill. App. 27.

It is not claimed that any other check or demand existed against the balance of \$11,401.17 which was in the bank at the close of business on the 14th, and the mere retenti of the Eggleston check by appellant did not constitute an acceptance on its part. *Overman v. Hoboken City Bank*, 2 Vroom, 563.

Appellant claims that the two one hundred thousand dollar drafts and the letter of advice have never been paid and therefore appellant could not be held liable for refusing to pay a check drawn against a deposit, if it subsequently turned out that the paper deposited was not good. We understand the law to be, that when the depositor has made, in good faith, a deposit of the bills of another bank supposed at the time by both parties to be solvent but which in fact was not, and the amount so deposited was in the ordinary course passed to the credit of the depositor as so much money, so many dollars, the bank receiving such deposits has been held to pay the amount to the depositor in good money, although it may be shown, as a fact, that the bills have never been paid; and this rule is said to extend to a bank which undertakes to make collection for its customer and pass the amount to the credit of the customer.

When the bank receiving specific funds or moneys appropriates such funds to its own use, and gives credit in the ordinary form to the depositor, there is no bailment of the specific funds or moneys received, and a simple indebtedness accrues. *Morse on Banks and Banking*, 43; *Oddie v. Nat. Bank of New York*, 45 N. Y. 735; *Marine Bank of Chicago v. Birney*, 23 Ill. 90; *Marine Bank of Chicago v. Chandler*, 27 Ill. 525; *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463; *Marine Bank of Chicago v. Ogden*, 29 Ill. 248; *Chicago Marine and Fire Ins. Co. v. Carpenter*, 28 Ill. 360.

The drawer has no control over the fund after he delivers the check, and an assignment carries with it the legal title to

VOL. 27.] Am. Exch. Nat. Bk. of Chicago v. Chicago Nat. Bk.

the amount of money therein named to each successive holder, and the drawer can not stop payment. *Union Nat. Bank v. Oceana Bank*, 80 Ill. 213.

When the payee of the check in suit presented it to the appellant for certification on the 14th of June, it was notice to appellant that the fund had been assigned, and the bank was in duty bound to retain the funds to meet it, if that amount was in the bank unincumbered at the time of the presentation.

The courts of this State hold that the drawing of a check by a depositor on his banker, operates as both a legal and an equitable assignment of the fund so drawn, if the amount is in the bank to the credit of the drawer. *Munn v. Burch*, 25 Ill. 35; *Sheffner v. Edgerton*, 13 Ill. App. 132.

The legal effect of a legal or an equitable assignment is well known. The doctrine is well settled that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at law or in equity only. *Morris v. Cheney*, 51 Ill. 452.

The law as laid down in England and followed by nearly all the States in this country and, as we think, in Illinois, is, that in order to protect his title against the debtor it is indispensable that the assignee should give notice of the assignment to the debtor or holder of the fund, for otherwise a priority may be obtained by a subsequent assignee or the debt may be discharged by a payment to a subsequent assignee before such notice. *Story's Eq. Jur.*, Secs. 1046, 1047; *Foster v. Blackstone*, 1 M. & Keen, 297; *Meux v. Bell*, 1 Hare Ch. R. 73; *Bispham's Eq.* 168; *Adams' Eq.* 145; *Pomeroy's Eq. Jur.*, Vol. 2, Secs. 688-696; *Barrow v. Porter*, 44 Vt. 587; *Muir v. Schenck*, 3 Hill, 228; *Morris v. Cheney*, 51 Ill. 451; *Moore v. Gromlat*, 3 Ill. App. 442.

Such notice operates as a constructive transfer of possession, and creates a trust in favor of the assignee and a lien thereon. *Adams' Eq. Jur.*, p. 161; *Pomeroy's Eq. Jur.*, Vol. 2, Sec. 688; *Wade on Law of Notices*, Secs. 435, 436; *Loomis v. Loomis*, 26 Vt. 203; *Cladfetter v. H. Cox*, 1 Sneed, 330; *McWilliams v. Webb*, 32 Iowa, 573; *Murdock v. Finney*, 21

Mo. 138; Woodbridge v. Perkins, 3 Day, 364; Bank of Commerce's Appeal, 73 Tenn. 60; Muir v. Schenck, 3 Hill, 229.

MORAN, J. On the 13th day of June, 1887, C. J. Kershaw & Co. drew their check on the American Exchange National Bank of Chicago, appellant, for \$10,000, payable to the order of M. Rosenfeld & Co., and on the same day delivered a check to the payee. On the 14th of June, M. Rosenfeld & Co. presented the check to the appellant at its bank for certification, and afterward, on the same day, deposited the check with appellee. Appellant refused to certify the check when it was so presented. The check was received by appellee in the usual course of business on the 14th, and on the morning of the 15th of June, the appellee presented the check to the cashier and assistant cashier of appellant before the opening of the bank on that day, and explained to it why the check had been given. Immediately upon the opening of the bank at ten o'clock, the appellee, through its messenger, Fred M. Blount, presented the check to appellant and demanded payment of the same. The appellant took the check when payment was demanded and endorsed upon it the words, "American Exchange National Bank, Chicago, returned account payment stopped," and returned it to the messenger refusing to pay the same. The check was never paid. On the 14th day of June, the day the check was first presented to the appellant for certification, the books of appellant showed a credit to the account of C. J. Kershaw & Co. of funds on hand in the amount of \$11,401.17. This balance was on the books of the appellant on the 14th at the time the check was first presented, and was continued on the books until the bank opened on the morning of the 15th. This balance was there when the messenger talked with the cashier and the assistant cashier before the opening of the bank on the 15th. The appellant at the time of the interview between the messenger and the cashier on the morning of the 15th, stated that payment of the check was stopped, and that was the only reason given why the bank would not pay it.

The appellant received its instructions to stop payment of the \$10,000 check from C. J. Kershaw & Co., on the evening

Vol. 27.] Am. Exch. Nat. Bk. of Chicago v. Chicago Nat. Bk.

of the 14th of June, and claims that it was notified to the same effect on the morning of the 15th. Both notices were subsequent to the presentation of the check in suit for certification and its transfer to appellee. At the time of the interview with the cashiers of appellant on the morning of the 15th of June, and also at the time of the presentation of the \$10,000 check for payment at the opening of the bank, appellant held in its possession for the account of C. J. Kershaw & Co., two drafts, each for the sum of \$100,000, one payable to the order of C. J. Kershaw & Co., the other to the order of appellant; also a letter of advice which appellant had received to the effect that Messrs. Wilshire, Eckart & Co., of Cincinnati, had deposited \$200,000 to the credit of appellant for the use of C. J. Kershaw & Co., from which appellant deducted \$800 for exchange, leaving a total credit to C. J. Kershaw & Co. of \$399,200, which would make, if credited on the books, together with the \$11,401.17 carried over from the 14th, a total credit to C. J. Kershaw & Co., of \$410,601.17, on the morning of the 15th.

Appellant did not enter the credit of the two drafts and letters of advice on the books, immediately on receiving the same, but the drafts and letters were about 12:30 or one o'clock p. m., upon the 15th, placed to the credit of C. J. Kershaw & Co., on the books of appellant.

On the 13th day of June, C. J. Kershaw & Co. issued their check to D. Eggleston & Son for \$256,878.18, which check was deposited by D. Eggleston & Son with appellant on the same day. Eggleston & Son and C. J. Kershaw & Co. both kept their accounts with appellant. Appellant did not charge the check to C. J. Kershaw & Co.'s account at any time until after the opening of the bank for business on the morning of the 15th. They, however, gave credit to D. Eggleston & Son for the amount of the check on the 13th, the day of its deposit, but on the morning of the 14th, after an interview with D. Eggleston & Son, appellant reversed the credit to Eggleston & Son, and charged back to them the amount of the check credited the day before.

During the whole of the 14th, the day the check in suit was

presented to appellant for certification, and at the time it was assigned and delivered to appellee, C. J. Kershaw & Co. had upward of \$11,491.17 of funds in the hands of appellant, the last named sum being the amount on hand at the close of business on the 14th.

On the morning of the 15th after the two \$100,000 drafts and letter of advice had been received, the appellant, for the first time, charged up to C. J. Kershaw & Co., the Eggleston & Son check of \$256,878.18.

Some checks of C. J. Kershaw & Co. were certified on the morning of the 15th before the check in suit was presented for payment, but it is not shown by the evidence what was the amount or number of such checks. A list of the Kershaw checks in the order in which they were certified by appellant that day was presented by the paying teller and is in evidence and there is some proof tending to show that appellee's agent, stood sixth or seventh in the line in front of the paying teller's window in the morning, and from this it is argued that at least the first six checks shown on the paying teller's list were certified before the one in suit was presented, and that, therefore, when it was presented, Kershaw & Co. were not in funds, even if the two \$100,000 drafts and the letters of credit be counted as to their credit on the morning of the 15th. The difficulty with this argument is that it assumes that all the persons who stood ahead of appellee's agent in the line, presented and obtained the certificate of Kershaw checks.

There is no evidence in the record to justify such assumption. Though appellee's agent stood sixth in line, there is nothing to show that he did not present the second or third Kershaw check that was presented to the cashier that morning. Assuming that the two drafts and the letter of credit were to the credit of Kershaw & Co., on the morning of the 15th, appellant has failed to prove that there was not funds sufficient to pay appellee's check at the time it was presented and payment demanded.

But appellant contends that the two drafts and the letter of credit was not to the credit of Kershaw & Co. till after

twelve o'clock on the 15th, and therefore there were no funds to pay this check when it was presented.

It is true that it appears that the drafts and letter of credit were not entered on the books to the credit of Kershaw & Co. till after noon, but it appears to us to be fairly established by the evidence, that as between appellant and Kershaw, these drafts and the letter of credit were treated as being to Kershaw & Co.'s credit from 10 o'clock in the morning. We can explain appellant's conduct, in charging the Eggleston check and continuing to certify Kershaw & Co.'s checks during the forenoon of the 15th, on no other theory.

There appears to us, also, to be strong reason for holding that the presentation of the check in suit to appellant's cashier before the opening of the bank, and his statement to appellee's agent that the payment of the check had been stopped, and that it would not be paid if tendered for payment, rendered any further presentation of the check unnecessary, and that the rights of the parties would be determined by the condition of Kershaw & Co.'s account at that time, as we have seen there was then to the credit of said account, on the books of the bank, sufficient funds to pay the check. We do not deem it necessary to elaborate this question. If the latter position is not legally tenable, we are satisfied that the judgment is sustained on the ground that when the check was presented to the teller for payment there was then funds to the credit of the drawers sufficient for the payment of said checks.

The judgment of the Superior Court will be affirmed.

Judgment affirmed.

GARY, J., took no part in deciding this case.

FREDERICK H. WINSTON ET AL.

v.

THE DORSETT PIPE AND PAVING COMPANY.

Corporations—Stock Liability as between Stockholders—Agreement—Validity of Subscription “in Trust.”

Winston v. The Dorsett Pipe and Paving Co.

1. An agreement operating between the stockholders of a corporation only, for an apportionment of their several stock liabilities, is neither contrary to law nor public policy.

2. Upon a bill filed by a stockholder to wind up a corporation, and to have an assessment made upon the unpaid stock for the payment of debts, it is *held*: That, as between the stockholders, the estate of one of the subscribers to the capital stock of the corporation is not liable on certain shares subscribed for "in trust," and that the court properly reserved the right to make further assessments if necessary.

[Opinion filed December 18, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

This is a bill in equity filed by Frederick H. Winston, under Sec. 25, Chap. 32, R. S., to wind up the Dorsett Pipe and Paving Company, a corporation for pecuniary profit, organized in 1881, in pursuance of said chapter 32. The bill alleges that the capital stock was \$125,000, and the original subscriptions were as follows:

D. H. Dorsett,	250 shares,	\$25,000
J. S. Waterman,	100 "	10,000
Joseph Stockton,	100 "	10,000
M. S. Chase,	100 "	10,000
J. P. Ellacott,	10 "	1,000
F. S. Winston, Jr.,	3 "	300
J. S. Waterman, trustee,	637 "	68,700
F. H. Winston,	50 "	5,000

1,250	\$125,000
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That the company became hopelessly insolvent in August, 1882, and so remains; that it is indebted in about the sum of \$10,000 to various parties; that judgments have been entered against it, and executions issued thereon, demand made upon the proper officers of the company for payment thereof, payment refused and said executions returned unpaid; that there is money enough due on the stock subscriptions to pay the debts; that the affairs of the company have been mismanaged by its officers, directors and agents; that Waterman is dead,

and Alden and Robinson are his executors and are made defendants; prays for a receiver, and that upon the exhaustion of the assets of the company an assessment may be made upon the unpaid stock for the payment of whatever debts remain against the company.

The answer of the executors of Waterman sets up as a defense that the alleged subscription by said Waterman of 637 shares was made by him as trustee for the corporation and the other subscribers to the capital stock, and at the request of all the other stockholders, including said complainant, under an agreement and understanding with them that he should not be liable upon said stock, and that his subscription therefor, as trustee, was only formal, to enable the corporation to organize, and that said stock was to be subscribed for and issued to other parties, and that subsequently over 400 shares of the stock set down to said Waterman as trustee was issued as original stock by said company to other parties, without the intervention, control or action of said Waterman; that it never was at any time claimed by any of the stockholders of said company, while said company was solvent, that said Waterman was liable upon said subscription of 637 shares of stock, or that he had any interest therein or control over the same; that he had never paid any assessments upon said stock, but the assessments upon the same, in so far as they were paid, were paid by other parties to whom the stock was issued by said company, without any transfer or assignment by said Waterman, either individually or as trustee; that said Waterman in his lifetime advanced and paid large sums of money to said company; denies that Waterman is liable to the creditors or stockholders of said company in any sum or amount whatever.

On the hearing, the Circuit Court decreed (among other things) that the estate of Waterman was not, so far as the other stockholders are concerned, liable on the subscription of said Waterman, as trustee for the six hundred and thirty-seven shares, but directed an assessment of \$.3943 on each dollar of stock of the other one hundred shares held by Waterman's estate, the seventy shares held by Stockton, fifty

Winston v. The Dorsett Pipe and Paving Co.

held by Winston and one hundred by Chase, and by the decree the court reserved the right to make a further order for an assessment or assessments, if the same shall be needed, to pay in full the debts and liabilities thereinbefore allowed, together with the costs of the proceeding and receiver's charge to be thereafter allowed; and the court also reserved the right to inquire into and further adjust the equities of the stockholders among themselves, if need be, and to make such other and further orders and decree as shall be equitable and proper for the final disposition of the suit. From that decree Winston, Stockton and Chase appeal.

Messrs. G. W. & J. T. KRETZINGER, for Frederick H. Winston, appellant, and Messrs. PAGE & BOOTH, for Joseph Stockton and Marvin S. Chase, appellant.

The trust sought to be established by the defendant executors is an express trust. The terms and conditions of such trust rest wholly in parol. The evidence is too uncertain and indefinite to enable a court in chancery to find the subject of the trust, or the interest of the *cestui que trust* without which no trust can be found or enforced.

No declaration of trust was ever made by Waterman. No *cestui que trust* was ever named. Clark v. Quackenboss, 27 Ill. 260; Langtry v. Langtry, 51 Ill. 458; Wheeler v. Smith, 9 How. 79; Story's Eq. Jur., Sec. 979a.

A stockholder can not sustain the relation of trustee to the company, either as the subscriber (as found in the decree) or purchaser of its stock. In a legal sense the corporation and the stockholders are identical; the former is the legal aggregation of the latter. A corporation can not thus deal in its own stock, and any attempt so to do is wholly void in law and equity. Verplanck v. Mercantile Ins. Co., 37 Cal. 30; Green's Brice's Ultra Vires, 96; Mechanics Bank v. N. & N. H. R. R. Co., 13 N. Y. 627.

"Conditional subscriptions are not contemplated; they would be a fraud upon the commonwealth." P. & S. R. R. Co. v. Biggar, 34 Pa. St. 457; Bavington v. P. & S. R. R. Co., 34 Pa. St. 358; Baile v. C. C. Educational Society, 47 Ind. 117.

By this subscription Waterman created a liability against himself and in favor of the corporation and all parties in interest which could not be enforced in law or in equity by the corporation or creditors against his unknown *cestuis que trust*. All calls and assessments upon this subscription must have been made against Waterman personally, the legal title being in him. *Crease v. Babcock*, 10 Metc. 545; *Hale v. Walker*, 31 Iowa, 352; *Fisher v. Seligman*, 75 Mo. 9; *Muir v. Glasgow Bank*, L. R. 4, H. L. 358.

The liability to pay calls attaches to the holder of the legal title only. *Henkle v. Salem M. Co.*, 39 Ohio St. 552.

Any agreement between Waterman and any or all of his co-subscribers to the effect that his subscription for the \$63,700 as trustee, should be only "formal," would be in violation of the charter and provisions of law under which the franchise to be a corporation was granted by the State, and therefore wholly void. *Baile v. C. C. Educational Society*, 47 Md. 117; *Corwith v. Culver*, 69 Ill. 502; *G. & S. R. R. Co. v. Enner*, 116 Ill. 55; *Melvin v. Lamar Insurance Co.*, 80 Ill. 446; *P. & S. R. R. Co. v. Biggar*, 34 Pa. St. 454; *Bavington v. P. & S. R. R. Co.*, 34 Pa. St. 358.

If the subscription of J. S. Waterman, as trustee, for \$63,700 "was only formal to enable the company to organize," as averred in the answer, and was not real, and no liability thereon attached as against Waterman, then and in that case that amount of stock was not subscribed within the meaning of the general incorporation law as construed by the Supreme Court in the above case, and, therefore, no liability attached to the other subscribers. *S. & B. R. R. Co. v. Gould*, 2 Gray, 278; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 424; *R. M. D. & S. Steamboat Co. v. Sewall, Adm'r*, 78 Me. 168; *Temple v. Lemon*, 112 Ill. 55.

Messrs. WILSON & MOORE, for the executors of J. S. Waterman, appellees.

GARNETT, P. J. The decree in this case seems to be satisfactory to the creditors of the Dorsett Pipe and Paving Com-

Winston v. The Dorsett Pipe and Paving Co.

pany; no creditor is complaining thereof; but the appealing co-stockholders of Waterman deny the propriety of exempting his estate from *pro rata* assessment on his subscription as trustee for 637 shares of stock. The practical effect of the decree is to compel the other stockholders to assume the liability of Waterman's estate on the 637 shares. The ruling of the Circuit Court does not transgress the rule of public policy which prohibits arrangements between stockholders by which some or all of them may evade responsibility to the creditors of the corporation. There is no rule of law or public policy which hinders any agreement, operative between the stockholders only, for an apportionment of their several stock liabilities. The interests of the creditors are not in any way affected by such agreements, nor is the corporation itself thereby barred of recovering from each subscriber the full face of the stock for which he agreed to pay. This is simply and solely a question between stockholders. At the hearing of the case in the court below, evidence was given tending to show that when all the shares but 637 had been taken and the names of the subscribers written on the subscription list opposite the several amounts thus taken, a question arose as to the remaining 637 shares. There being no person who wanted those shares, a suggestion was made that Waterman should subscribe therefor as trustee for the other stockholders; he inquired about the liability, was answered that so far as the stockholders were concerned, there would be no liability on his part, and thereupon he wrote his name as it appears in the subscription list, with the word "trustee" following and the figures 637 opposite. All this happened when the appellants and all other stockholders were present, and we do not perceive why that agreement of the stockholders should not now be enforced. Counsel for appellants has vigorously combated certain of the facts stated above, but making all due allowance for the admissible evidence given for appellants, we find therein nothing inconsistent with the foregoing statement. Should there be a failure to collect on the stock, other than the 637 shares, sufficient money to pay the debts and costs, we must presume that proper measures would be adopted by the court

iffs that she would pay the plaintiffs the amount of their claim or secure it, if they, the plaintiffs, would not attach said goods, and if you further believe from the evidence that such promise, if made, was for the purpose of securing and promoting her own personal advantage and protecting her interest in said goods by preventing the levy of said attachment, or was to secure some other substantial and material advantage or benefit to her, the said Alice E. Bates, and if you further believe from the evidence that the plaintiffs, in consideration of such promises, if such a promise was made, did not commence said attachment suit, but refrained from doing so by reason of said promise (if you believe such promise was made), then the court instructs you that such promise, if made, was upon a valid consideration, and the law would not require such a promise (if made) to be in writing."

And refused, when asked by appellant, this:

"If the jury find from the evidence that Mrs. Alice E. Bates did ask the plaintiffs not to attach the property of Riall & Bates, and did promise that she would pay their claim against Riall & Bates if they would not attach, still, if they do not believe from the evidence that the plaintiff had legal grounds for such attachment, then the jury should find for the defendants."

The case in this State coming nearest to the support of appellees' position upon these instructions, is *Borchsenius v. Canutson*, 100 Ill. 82. There *Borchsenius* held, as security for money, a policy on the life of one *Irgens* (since dead) on which he had paid premiums. The widow agreed with him, that if he would surrender the policy, she would pay, and the policy being surrendered, she received the money as her widow's award. The cases of *Eddy v. Roberts*, 17 Ill. 505; *Wilson v. Bevans*, 58 Ill. 232, and *Meyer v. Hartman*, 72 Ill. 442, are upon promises upon sufficient consideration between the original debtor and the defendant, by which the defendant undertook to pay debts of the promisee, and such promises are in those cases, held to be not within the statute of frauds, and being for his benefit, may be sued upon by the creditor or was to be paid.

Bates v. Sandy.

In *Clifford v. Luhring*, 69 Ill. 401, the original contractor having failed to perform, and the sub-contractor refusing to go on, the promise by the owner to the sub-contractor was to pay for work thereafter done. *Hite v. Wells*, 17 Ill. 88, seems difficult to distinguish from the case first cited, but it is the duty of this court to conform to the latest decision of the Supreme Court, if they are conflicting.

But in the case in 100 Ill., and in *Curtis v. Brown*, 5 Cush. 491, there cited, an element existed and was relied upon as a ground of decision that does not appear in this case. The promisee had something of value to surrender. Here, for all that appears, appellees had no ground for an attachment, and so, by their promise not to attach, did not forego any privilege or abandon any right. The instruction is not based upon the hypothesis that the appellees even believed that they had any ground for an attachment, if that would have brought them within the rule in *Daffin v. Roberts*, 9 Ill. App. 103; *McKinley v. Watkins*, 13 Ill. 140; and *Miller v. Hawker*, 66 Ill. 185.

A promise not to abuse the process of the court (*Bracewell v. Williams*, 11 L. R. C. B. 198) or to forbear suit upon an unfounded claim (*Knotts v. Preble*, 50 Ill. 226; *Mulholland v. Bartlett*, 74 Ill. 58), is no consideration for a promise to pay.

The principle of the instruction asked for by the appellant was therefore right, at least to the extent that the appellees should have had an honest belief that they had a right to attach, but in leaving to the jury whether they had "legal" grounds, was wrong. The law is not to be left to the jury.

The conversation with Hall, testified to by A. C. Sandy, was not evidence against the appellant. If he was an agent, his statements, not part of any business he was doing for his principal, were not evidence. *Bensley v. Brockway*, *ante*, p. 410. This evidence might, perhaps, not have been deemed so material as to require a reversal of the judgment, if there were no other error.

Whether, if there had been such circumstances as gave appellees the right to attach, forbearance would be such a new and sufficient consideration for a promise, as to take the case out of the statute, is a debatable question. "Extreme cases

VOL. 27.] N. Y. and Chicago Grain and Stock Exch. v. Mellen.

make bad law," but no case cited is quite so extreme as to sustain that proposition. For the error in giving the instruction on behalf of appellees, the judgment is reversed and the cause remanded.

Reversed and remanded.

27 566
139 456

THE NEW YORK AND CHICAGO GRAIN AND STOCK
EXCHANGE

V.

H. B. MELLEN.

Gaming—Action to Recover Money Lost—Secs. 130 and 132, Criminal Code—Chance.

1. The loser of money lost in such gaming as is prohibited by Sec. 130, Criminal Code, may maintain an action for its recovery.

2. Traffic in differences which are determined by chance is gaming within the meaning of Sec. 130, Criminal Code.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the
Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. BISBEE, AHRENS & DECKER, for appellant.

Mr. NATHANIEL C. SEARS, for appellee.

MORAN, J. Appellee brought his action in the court below to recover money paid by him to appellant on certain dealings in grain or stocks. The alleged "dealings" were carried on by the aid of a device which the witnesses call a clock. This clock is a piece of machinery that works automatically. The quotations are printed on cards ranging from one-eighth to one-half cent, there being an equal number of each. Fifteen hundred and sixty of these quotations are placed in the machine after having been first thrown together and

mixed up on a table. At half past nine o'clock in the morning the machine begins to give the market. The quotations appear one above the other, the upper showing the rise and the lower the decline of the market, the upper being called first and the lower one next.

As soon as called, the quotations are placed on a blackboard. On some of the cards are printed as well as the fractions above stated, the word "wheat," on others the name of some stock. The regular market price of each commodity supposed to be dealt in is placed on the blackboard every morning, and the cards having the name of the particular article would, as they came from the upper or lower aperture of the clock, show the advance or the depreciation of the commodity.

The clock gave quotations every half minute, and those who dealt, bought or sold at the price which, for the time being, was shown on the blackboard, and the usual practice was to close out the deal on the next quotation that changed the price, by the payment of differences.

That this kind of dealing was gaming, within the prohibition of our statute, can scarcely be doubted. The quotations on the blackboard were determined by the chance operation of the clock instead of any actual sales of the particular article in the market, and each deal was in essence and effect a bet as to what the next card that issued from the clock bearing the name of the article dealt in, would show.

It is suggested that determining by chance at what price an article shall be bought or sold does not render the transaction gaming. This may be true if there is an actual *bona fide* intent on the one part to deliver, and on the other to receive and pay for, the article at the price fixed; but where the transaction shows an intent merely to traffic in differences which are determined by chance, it is gaming, by whatever method the price may be fixed. It is not very seriously contended by counsel for appellant that the dealing described was not gaming, but it is argued that, if it was, the money lost can not be recovered by plaintiff, for the reason that he, as well as the defendant, were both engaged in the criminal act, and the law will not aid a plaintiff to recover money paid by him in pur-

nuance of such criminal act. If there were no change made in the common law by our statute, counsel's position would be sustained; for, at the common law, if the parties were *in pari delicto*, the law would leave them as it found them, giving aid to neither. But Sec. 132 of our Criminal Code has changed the law in this regard, and gives to the loser in gaming the right to recover from the winner the money or other valuable thing which he shall have so lost and paid or delivered to the winner. That the provisions of Sec. 132 authorize the recovery of money lost in the kind of gaming prohibited by Sec. 130 of the Criminal Code is expressly decided in *Pearce v. Foote*, 113 Ill. 228.

The finding of the court as to the amount for which the judgment was rendered is clearly supported by the evidence, and the judgment being warranted in point of law, the same will be affirmed.

Judgment affirmed.

WINONA PAPER COMPANY

V.

W. O. TAYLOR COMPANY.

27	558
41	324
27	558
44	359

Assignment—Delay in Presenting Claim—Excuse—Order—Appeal—Bill of Exceptions.

This court affirms an order of the County Court allowing a claim against an insolvent estate, what purports to be a bill of exceptions being substantially defective.

[Opinion filed December 18, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

MESSRS. FLOWER, REMY & HOLSTEIN and HARRISON MCS-
GRAVE, for appellant.

MESSRS. MOSES & NEWMAN, for appellees.

City of Chicago v. Enright.

GARY, J. It is an agreeable reflection in affirming the judgment in this case upon a technicality, that no injustice is done, and that the Merchants National Bank of Chicago, who are the parties beneficially interested in sustaining the action of the County Court, are in competition with the other creditors of the appellees, upon the same footing as to equities.

The appellees made a voluntary assignment of their effects for the benefit of their creditors, and the estate was being administered in the County Court, under Chap. 72, R. S. 1872. The bank presented a claim which was opposed by other creditors, upon the ground that it was not presented in time. The court held the excuse for delay sufficient and allowed the claim, the justice of which is not questioned. Whether the County Court did right or wrong in excusing the delay, is a question this court is not called upon to decide, as no exception was taken in the County Court by the appellants. What purports to be a bill of exceptions has a formal commencement, "That on the hearing of the petition of the bank," etc., and recites the testimony of a witness, the protest of the attorneys of the bank against any bill of exceptions being signed, and then follows: "As the above matters do not appear on record this bill of exceptions is tendered, and it is prayed that the same may be signed," etc. Who tenders, and who prays? There is no statement that the testimony recited was the whole evidence, or that anybody objected, much less excepted, to anything the court did.

The judgment is affirmed.

Judgment affirmed.

CITY OF CHICAGO

V.

JOHN W. ENRIGHT ET AL.

Licenses—Spirituous Liquors—Action by Municipal Corporation—Remedies—Statutory Limitations—Practice.

27	559
54	104
27	559
66	806
27	559
70	306

1. Where one engaged in the sale of spirituous liquors fails to take out the required license, he does not become indebted to the city for the amount of the license fee.

2. The limitation provided in ¶ 375, Criminal Code, applies only to criminal prosecutions by indictment or otherwise. It has no application to a proceeding to collect a penalty.

3. Where a penalty is imposed without direction as to the mode of procedure for its recovery, an action of debt is a proper remedy.

4. An action of debt for a penalty for the violation of a municipal ordinance is purely a civil action, and may be brought within two years after the right accrues.

5. In such an action, although the record contains an agreed statement of facts, this court is without jurisdiction to fix the amount of the judgment.

[Opinion filed December 18, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Appellant brought its action in the Circuit Court against appellee and filed its declaration as follows, viz.:

“FIRST COUNT—And the said plaintiff, by H. Washburn, its attorney, comes and complains of John W. Enright and Edward F. Kelly, defendants, in its action of debt.

“For that whereas the plaintiff is a municipal corporation of the State of Illinois, organized under an act entitled ‘An act to provide for the incorporation of cities and villages,’ approved April 10, 1872.

“That the city council of the city of Chicago did on the 1st day of July, 1885, pass a certain ordinance in words and figures as follows, viz.:

“Be it ordained by the city council of the city of Chicago:

“SECTION 1. No person, firm or corporation shall sell or offer for sale any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city of Chicago without first having obtained a license therefor from the city of Chicago, under a penalty of not less than fifty and not more than two hundred dollars for each offense. But no distiller who has taken out a license as such and who sells only distilled spirits of his own production at the place of manufacture

shall be required to pay the license herein prescribed on account of such sales.

“SEC. 2. All such licenses shall be issued in accordance with the general ordinances of the city concerning licenses, and for every such license there will be charged at the rate of two hundred and fifty dollars per annum.”

“Which said ordinance was approved by the mayor of said city of Chicago, and was in full force and effect on the 1st day of July A. D. 1885.

“That said defendants are co-partners, doing business as Enright & Kelly, and are now and have been ever since July 1, 1885, engaged in business within said city of Chicago, selling and offering for sale spirituous and vinous liquors in quantities of one gallon or more at a time without having or having had any license therefor from said city of Chicago.

“By reason whereof, and by force of the ordinance aforesaid, there became due and is still owing to said plaintiff by said defendants, the sum of four hundred and forty-seven and ninety-one one-hundredths dollars (\$447.91), being the amount of the license fees from July 1, 1885, to May 1, 1887.

“Yet the said defendants, though often requested, did not and have not paid the plaintiff the said sum of money aforesaid, or any part thereof, but refuse so to do, to the damage of the plaintiff in the sum of one thousand dollars, wherefore it brings its suit, etc.

“And for that whereas the defendants have been since July 1, 1885, and up to April 30, 1886, selling and offering for sa'e within said city of Chicago spirituous and vinous liquors in quantities of one gallon or more at a time, without having had any license therefor from said city of Chicago, in violation of the said ordinance entitled, ‘An act concerning the licensing of wholesale liquor dealers,’ which said ordinance is set out in the first count of this declaration, whereby by force of said ordinance, an action has accrued to the plaintiff to demand of the said defendants the sum of two hundred dollars as a penalty for such unlawful sales and offers to sell by the said defendants.

“Yet the defendants, though requested, have not paid to

the plaintiff the last mentioned sum of money, or any part thereof, but refuse so to do, to the further damage of the plaintiff of one thousand dollars, and therefore it brings its suit," etc.

Appellee appeared and filed a demurrer to the first count in the declaration, and a plea of the statute of limitations of one year and six months to the second count. To this plea appellant demurred, and the matter was heard upon the said appellee's demurrer to the first count, and on appellant's demurrer to said plea, and appellee's demurrer was sustained and appellant's demurrer was overruled, and there was judgment for appellee.

It was stipulated between the parties that the following ordinance was passed by the city council July 1, 1885, and was in force since its passage and at the time of the trial:

"SECTION 1. No person, firm or corporation shall sell or offer for sale any spirituous or vinous liquors in quantities of one gallon or more at a time within the city of Chicago, without first having obtained a license therefor from the city of Chicago, under a penalty of not less than fifty nor more than two hundred dollars for each offense.

"But no distiller who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to pay the license herein prescribed, on the account of such sales.

"SEC. 2. All such licenses shall be issued in accordance with the general ordinances of the city concerning licenses, and for every such license there shall be charged at the rate of two hundred and fifty dollars per annum."

That the general ordinances referred to in the above ordinances are as follows:

"1565. All licenses shall be granted by the mayor from time to time, to such persons as he may deem proper residents of the city of Chicago.

"1566. Each and every license authorized and required by this ordinance and granted by the mayor, shall be issued by the city clerk, on notice to him from the city collector that the license fee or tax has been paid and not otherwise.

"1567. All licenses shall be subject to the ordinances and regulations which may be in force at the time of issuing thereof, or which may subsequently be made by the city council, and if any person so licensed shall violate any of the provisions thereof, he shall be liable to be proceeded against for any fine or penalty imposed thereby, and his license may be revoked in the discretion of the mayor.

"1568. No license granted under this ordinance shall be assignable or transferable without permission of the mayor, nor shall any such license authorize any person to do business or act under it but the person named therein, except as is in this ordinance otherwise provided.

"1569. No license shall be granted for a longer period than one year, and every license except saloon licenses shall expire on the last day of April next following. Every license shall be signed by the mayor and countersigned by the clerk under the corporate seal.

"1570. In all cases where it is not otherwise expressly provided, the mayor shall have power to hear and grant application for licenses upon the terms specified by this ordinance, and all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance, and as the mayor in his discretion shall deem suitable and proper persons to be licensed.

"1571. The city collector shall receipt for all moneys for any licenses that may be granted under the authority of said city upon any account whatever; his receipt shall be a discharge to the person to whom given, to the extent and purport thereof, but no person shall be deemed to be licensed in any case until the issuing of the license in due form as herein required.

"1572. Whenever it shall appear from the license register kept by the clerk or the books of the collector, that any person holding any license or permit of any kind or privilege granted by the city, has failed to pay the amount due thereon, or other kind of penalty, license, fine, debt, or liability whatever, the clerk or collector, as the case may be, shall report the fact to the mayor, whose duty it shall be promptly to revoke said license, permit or privileges.

"1573. Any person or persons to whom any license may have been issued under any ordinance of the city council, may, with the permission of the mayor, assign and transfer the same to any person or persons, and the person or persons to whom such license is assigned, or the assignee or assignees of such license, may, with the permission of the mayor, surrender such license and have a new license issued for the unexpired term of the old license, authorizing the person or persons so surrendering such license to carry on the same business or occupation at such place as may be named in such new license; provided, that in all cases the party applying for such new license shall give a bond with sureties which shall conform as near as may be to the bond to which such surrendered license was issued.

"1574. When any saloon license is issued after the first day of July, or other license is issued after the first day of May in any year, the same shall be issued to the person applying therefor upon his paying therefor the number of twelfth parts of the sum fixed for a yearly license equal to the number of months which will elapse between the date of the application for the license and the day when, under this article, said license is made to expire; provided, however, that in determining the price to be paid, the month in which the application is made shall be counted and included in the number of months to elapse, and provided further, that no person shall be entitled to the benefit of this section who shall be engaged in the business for which he applies for a license, at the time of his application."

It was also agreed by said parties, that said John W. Enright and Edward F. Kelley were doing business under the firm name of Enright & Kelley on the first day of July, 1885, as wholesale liquor dealers, within the said city of Chicago, and have continued as such up to the present time, and that, on said July 1, 1885, and ever since said time, said Enright and Kelley have sold, within the city of Chicago aforesaid, spirituous and vinous liquors in quantities of one gallon or more at a time without any license so to do from the city of Chicago, and that said Enright and Kelley have never ap-

plied for, nor have asked of the city of Chicago any license for said period from July 1, 1885, to May 1, 1887, under the provisions of this ordinance, but on the contrary have refused so to do, notwithstanding that the city collector has made frequent and repeated demands upon them for said license fees for each of said years.

MESSRS. HEMPSTEAD WASHBURN, CLARENCE A. KNIGHT and JOHN W. GREEN, for appellant.

The Supreme Court, in *Dennehy v. City*, 120 Ill. 627, settled the question as to the validity of the ordinance in question. Now, by this ordinance, a duty was imposed upon defendants to pay the amount of license fee fixed by this ordinance. The city has the undoubted right to prohibit altogether, or to classify liquor dealers as decided by the court in the *Dennehy* case. The power given the city is, "To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquors, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." The city having the right to prohibit or grant licenses, determines that it will grant, and in so doing determines the amount to be paid for such license. In this case it has said that the amount to be paid by every person selling as a wholesale dealer shall be \$250 per annum. When it so determined, it fixed the amount which every person engaging in that business should be liable to pay for that privilege or right.

In the case of *East St. Louis v. Trustees of Schools*, 102 Ill. 491, the court say: "Where a municipal corporation has power to prohibit the doing of a thing, and also the power to license the same thing to be done, the license fee demanded by ordinance for the doing of such thing is not a tax, but is a price paid for the privilege of doing such thing; and so it was held in *People v. Thurber*, 13 Ill. 554; *Ins. Co. v. Peoria*, 29 Ill. 180; *East St. Louis v. Wehrung*, 46 Ill. 392; *Ducat v. Chicago*, 48 Ill. 172; *Walker v. Springfield*, 94 Ill. 372. In *People v. Thurber* it is said of a like exaction, this is not a

tax * * * but is a burden * * * for the right of exercising a * * * privilege which the legislature would have the right to withhold or inhibit altogether."

So the city in this case fixed the price to be paid for the privilege of doing business as a wholesale dealer. The amount of license fee required in this case is from the persons and not from the property.

It would seem from the cases cited that the ordinance in question imposes on appellees a duty to pay the amount of the license fee fixed, and having created the duty to pay under the law, then necessarily a right of action accrued to the city, and the law implies a promise to pay on the part of appellees.

In *County Comm'rs v. Duchett*, 20 Md. 468, the court say: "When a duty is imposed by law and no remedy prescribed, a right of action accrues as at common law, otherwise there would be a right without a remedy."

In *Fuller v. Curtis*, 2 Black, 461, the court say: "Where the case shows that it is the duty of the defendant to pay, the law implies to him a promise to fulfill that obligation."

In *Earle v. Coburn*, 130 Mass. 596, it is said: "There may be cases where the law will imply a promise to pay by a party who protests he will not pay, but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf."

In *San Louis v. Hendricks*, 71 Cal. 242, suit was to recover \$150, the amount of a license for selling liquors, and for damages and costs of suit; the court says: "The license tax sought to be recovered in this action is not a penalty, but in the nature of a debt due from the defendant to the county, or, what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county to pay such sum of money. *People v. Seymour*, 16 Cal. 332; *Perry v. Washburn*, 20 Cal. 351; *Guy v. Washburn*, 23 Cal. 116; *City of Oakland v. Whipple*, 39 Cal. 115."

The theory of all cases that may be found denying the right

to bring an action for the recovery of the license fee is that when a penalty is fixed for the non-payment of the tax or license that penalty must be pursued. But our Supreme Court have long since denied this doctrine, and say that in case of a tax that it may be sued for in an action of debt, and the remedy by distress is merely cumulative. *Ryan v. Gallatin County*, 14 Ill. 78; *Dunlap v. Gallatin County*, 15 Ill. 7; *People v. Stahl*, 101 Ill. 346; *Geneva v. Cole*, 61 Ill. 397; *Binkert v. Wabash Ry. Co.*, 98 Ill. 214.

No counsel appeared for the appellees.

MORAN, J. The first count of the declaration proceeds upon the assumption that appellees, having sold spirituous liquors in quantities of one gallon or more without having obtained the license required by the ordinance, became indebted to the city for the amount of the license fee. The consideration for a license is sought to be recovered while it appears from the allegations of said count that no license had in fact been taken out.

The count was clearly bad, and the demurrer to it was properly sustained.

"A person carrying on a business for which a license is required, can not be compelled to take out a license. If he neglect or refuse to do so, he may be subject to a criminal prosecution, or he may be held to have agreed to pay a specific penalty instead of the amount of the license tax; but he certainly owes nothing for a license until he has taken out a license." *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143.

The action of the court in overruling the demurrer to appellees' plea presents a different question. The second count is for a penalty for violating the ordinance in the manner stated in the count. The plea is of the statute of limitations found in the Criminal Code, Sec. 375, which is as follows:

"All prosecutions, by indictment or otherwise, for misdemeanors or for any fine or forfeiture under a penal statute, shall be commenced within one year and six months from the time of committing the offense or incurring the fine or forfeiture, except as otherwise provided by law."

The proceeding set out in said second count is not a prosecution by indictment or otherwise. The well understood legal signification of the word prosecution is a criminal proceeding, and as such it must in this State be in the name of the people. The limitation in the section above quoted applies to such criminal prosecutions by indictment or otherwise (as by information, when authorized) for any fine or forfeiture under a penal statute. It can have no application to a proceeding to collect a penalty which is not in any sense a criminal prosecution. The ordinance does not inflict a fine for its violation, but in terms imposes a penalty. Where penalties are imposed and no direction is given as to the mode of procedure for their recovery, an action of debt is a proper remedy. *Webster v. The People*, 14 Ill. 365; *Vaughn v. Thompson*, 15 Ill. 39; *Town of Jacksonville v. Block*, 36 Ill. 507.

An action of debt for a penalty for the violation of a municipal ordinance is purely a civil action. *Town of Lewiston v. Proctor*, 27 Ill. 414; *Town of Havana v. Biggs*, 58 Ill. 483; *Webster v. The People*, *supra*; *Town of Partridge v. Snyder*, 78 Ill. 519.

The second count is, then, an action of debt for a statutory penalty, and not a prosecution for a fine or forfeiture under a penal statute. It is, therefore, not governed by the limitation of eighteen months, fixed by Sec. 375 of the Criminal Code, but by Sec. 14 of the general statute of limitations, which allows two years after the right accrues within which to bring the action.

It follows that the court erred in overruling the demurrer to appellees' plea to the second count of the declaration. All the questions of law in this record arise on the pleadings.

There is in the record an agreed statement of facts, upon which appellant is entitled to a judgment against appellees, but the amount of such judgment this court has no jurisdiction to fix on this record. That question must be left to the determination of the trial court.

The judgment is reversed and the case remanded to the Circuit Court.

Reversed and remanded.

JOSEPH DAVIS ET AL.
v.
CHICAGO DOCK COMPANY.

Jurisdiction—Appeal—Freehold.

This court dismisses, for want of jurisdiction, an appeal from an order of the County Court directing an assignee to execute and deliver a quit claim deed of certain real property.

[Opinion filed December 18, 1888.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. HOLZHEIMER, ELIEL & ROSENTHAL, for appellants.

Mr. M. W. FULLER, for appellee.

Per Curiam. This is an appeal from an order of the County Court of Cook County, on petition of appellee, directing the assignee of Sherman & Marsh, insolvent debtors, to execute and deliver to appellee a quit claim deed for block 74 in the School Section Addition to Chicago.

On September 21, 1881, a judgment by default was entered in the Circuit Court of Cook County for one cent and costs in favor of Sherman & Marsh and against appellee. Execution was issued on said judgment September 22, 1881, and returned December 22, 1881, no part satisfied. An alias execution issued January 27, 1882, upon which no demand was made, but levy thereunder was made on said block 74.

The property was advertised and sold by the sheriff to the attorney of Sherman & Marsh, on February 27, 1882, for \$17.25, that being the whole amount of the execution and costs. The certificate of sale was assigned by the purchaser to one of the plaintiffs, a sheriff's deed was issued to such as-

signee, and whatever title (if any) passed to him was vested in him when the assignment for benefit of their creditors was made by Sherman & Marsh.

We have no doubt whatever that the order appealed from involves a freehold, and therefore this court has no jurisdiction of the appeal.

Appeal dismissed.

THE HAMBURGER COMPANY

v.

LEOPOLD LEVY.

Action to Recover for Services—Evidence—Contracts—Misnomer—Conflict of Evidence—Question for Jury.

1. This court sustains the action of the court below in admitting in evidence certain contracts, it being plain from the entire record that they were with the defendant corporation, although they describe it by a different name than that by which it is sued.

2. That the evidence is not only contradictory but unsatisfactory. this court being unable certainly to discover the process by which the jury reached their conclusion, does not justify an interference with the verdict.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. JOHN M. GARTSIDE, for appellant.

No counsel appeared for appellee.

Per Curiam. This was a suit by appellee to recover of appellant compensation for services rendered, the result being a verdict and judgment for appellee for \$600. The appellee was employed as salesman by appellant in January, 1885, and remained in its service until April, 1886.

The Hamburger Co. v. Levy.

The evidence shows that a written contract was made between the parties dated January 20, 1885, for the ensuing year, and on January 20, 1886, another written contract was made for the next year. The first contract was signed by the Hamburger Bros. Co., and the second was signed by Levy only, but described appellant as Hamburger & Garrity Company. In both it was agreed that appellee should receive ten per cent. on all his sales up to \$40,000 in amount, and five per cent. on all sales over that amount. Although the written contract described appellant by a name different from that by which it is sued, it is plain from the entire record that the contracts were with appellant, that the services contracted for were rendered to it, and there being no issue as to misnomer, the point raised by appellant that the court admitted the instruments in evidence over its objection can not be considered.

It may be frankly admitted, not only that the evidence is contradictory, but that it is unsatisfactory, and that we can not certainly discover the process by which the jury reached the conclusion that appellant was indebted to appellee in the sum of \$600, but that does not bring the case within any rule which justifies interference with the verdict. The same criticism may be justly made in scores of cases which are brought to the attention of this court. The answer is that the composition of juries peculiarly fits them to unravel just such difficulties, and their findings in such cases are permitted to stand unless error has intervened.

The contract may have required Levy to continue to serve appellant until January 20, 1887, as a condition of his receiving any commission, but Levy testified that appellant consented to the severing of their relations, and by their verdict the jury have found that to be true.

Finding no error of law in the record, the judgment will have to be affirmed.

Judgment affirmed.

JOHN J. CURRAN ET AL.

V.

PULLMAN PALACE CAR COMPANY.

Agency—Evidence—Declarations of Agent.

The declarations of an agent are incompetent to charge his principal.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the
HON. ELLIOTT ANTHONY, Judge, presiding.

Mr. E. HANEY, for appellants.

Mr. WILLIAM BERRY, for appellee.

GARY, J. The appellees sued the appellants for the wages of men, and the value of material furnished, as the appellees alleged, to the appellants, in making some changes in lumber dryers, erected upon the premises of appellees some years before, in which patent devices of appellants were used.

Whether the appellants were to pay appellees the wages of the men and the value of the material, was in controversy, and which is in the right of that question is left untouched here. But if the right is with the appellees, there is not a syllable of competent evidence in the case as to what, either of labor or material, was furnished, or of any values.

The only evidence relating to those matters is the testimony of Daniel Martin, who was superintendent of the carpenter department of the appellees, that he directed men and material to be furnished to the foreman of the appellants, and approved the bills made out in his department, charging the appellants; of the truth of which bills he had not at the time of testifying, and never had any personal knowledge. The

 Horner v. Boyden.

declarations of appellants' foreman charging them with liability are not evidence. *Bensley v. Brockway*, ante, p. 410.

Without reference to many other matters assigned for error, which are not likely to happen again, the judgment must be reversed for the error of not granting a new trial.

Reversed and remanded.

 HANNAH HORNER ET AL.

V.

NOEL B. BOYDEN, FOR USE, ETC.

27	578
196s	458

Replevin—Sales—Fraud—Debt on Bond—Change of Action to Assumpsit—Effect of—Practice—Evidence.

1. Where, in an action of debt on a replevin bond, the bond is stated in legal effect in the declaration, it is unnecessary to prove its execution, unless it has been denied by plea verified by affidavit.

2. The change by the plaintiff of an action of replevin, brought to recover goods alleged to have been obtained by fraud, to an action of assumpsit, operates to affirm the sale as to all the goods in question, and the plaintiff can not thereafter defend an action on the replevin bond on the ground of fraud in the purchase of the goods.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH GARY, Judge, presiding.

Mr. ALLAN C. STORY, for appellants.

In this case no copy of the bond was filed with the declaration, and the statute has, therefore, no application, but the common law rule prevails, that upon a plea of *non est factum* the plaintiff is put upon proof of the execution of the instrument sued on. 1 Chitty, 483; *Gardner v. Gardner*, 10 Johns. 47; *Seymour v. Harvey*, 8 Conn. 63; *People v. Rowland*, 5 Barb. 449; *Kane v. Sanger*, 14 Johns. 89; 2 Greenlf. on Ev., Sec. 279; *Longley v. Norvall*, 1 Scam. 389; *Smentek v. Cornhauser*, 17 Ill. App. 266.

The court below erroneously received evidence, and allowed \$50 as damages for attorney's fees for appearing and dismissing replevin suit for want of narr. This evidence was also especially objected to, and exception preserved. No such damages are recoverable in this class of cases, although attorney's fees may be recovered in this State on injunction and attachment bonds, the conditions of which, however, are different from the bond in suit. *Park v. McDaniels*, 37 Vt. 594; *Earl v. Tupper*, 45 Vt. 287; *Pacific Ins. Co. v. Conard*, 1 Baldwin, 138.

MESSRS. KRAUS, MAYER & STEIN, for appellee.

MORAN, J. This is an action in debt on a replevin bond given to appellee as coroner in a suit brought by appellants against Hanchett, sheriff, and one Langbien, in which suit there was taken on the replevin writ from said sheriff, and delivered to appellants, certain goods and merchandise. The bond sued on was set forth in its legal effect in both counts of the declaration, but no copy of the bond was attached thereto.

The pleas were *non est factum*, property in appellants, and that the merits of the replevin action were never tried. There was a trial by the court without a jury and a judgment was rendered against appellant for \$474. On this appeal it is urged that the court erred in allowing the bond sued on to go in evidence without proof of its execution.

The action was brought on the bond and the declaration stated said bond in legal effect and it was therefore unnecessary to prove its execution, that not having been denied by a plea verified by affidavit. Sec. 33, Practice Act; *Reed v. Phillips*, 4 Scam. 39; *Delahay v. Clement*, 2 Scam. 575; *Gaddy v. McCleave*, 59 Ill. 182.

It is further urged that the evidence does not support the findings of the court and it is contended that the evidence clearly shows that Langbien obtained the goods from appellants on credit, intending not to pay for them. We are inclined to believe that if the case was to turn on that point, we should find difficulty in concluding that the finding was so far without support as to authorize us to reverse the judgment,

Horner v. Boyden.

but in the view we take of this case, it is unnecessary for us to decide that question.

It appears from the record that after the dismissal of the replevin suit as to Hanchett, and the awarding of a return as to him, the appellants took leave to change the form of the action as to Langbien, from replevin to assumpsit, and Langbien pleaded to the amended declaration, and by agreement the cause was submitted to the court for trial, and a judgment rendered against Langbien for the whole amount due from Langbien to appellants, including the bill for the goods alleged to have been fraudulently purchased. A few days afterward appellants amended the judgment so entered against Langbien by remitting therefrom the value of the goods which had been taken on the replevin writ. That is to say, appellants brought replevin for a certain lot of goods which they alleged had been obtained from them by fraud; they obtained on the writ a portion of the goods described; they then, without trying the replevin suit, changed the form of action and took judgment in assumpsit for such of the goods as they failed to retake by the replevin, and then, in an action on the replevin bond, they seek to justify for taking the goods by setting up that they were obtained by fraud. By changing the replevin action to assumpsit they elected to affirm the sale and not to rescind it. They could not affirm the sale as to a part of the goods, and rescind it as to another part, and when they affirmed it as to Langbien, they necessarily affirmed it as to all persons who claimed under him as creditors or purchasers. *Benj. on Sales*, Secs. 433, 442; *Conihan v. Thompson*, 111 Mass. 270; *Hanchett v. Riverdale Dis. Co.*, 15 Ill. App. 57; *Barhydt v. Clark*, 12 Ill. App. 647, and cases there cited.

The affirmance of the contract of sale left appellants entirely without any defense to the replevin bond based on fraud in the purchase of the goods.

The evidence supports the finding as to the amount of damages assessed and, there being no error in the record, the judgment must be affirmed.

Judgment affirmed.

GARY, J., took no part in the decision of this case.

FELIX JOHANNES

V.

ELIZABETH KIELGAST.

Landlord and Tenant—Termination of Lease by Notice—Forcible Detainer—Action for Rent.

1. Where a lease has been terminated by notice and an action of forcible detainer successfully prosecuted, the landlord can not maintain an action for installments of rent which would have become due had the lease continued in force.

2. In the case presented, the covenant to pay rent did not continue in force after the lease was terminated by notice and pending the action of forcible detainer.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. MARTIN C. NEUBERGER, for appellant.

The judgment for possession establishes conclusively the termination of the lease and tenancy, and that during the time appellant occupied the premises after the expiration of the notice he was a trespasser and tortfeasor. Appellee could only recover damages for the wrongful detention of the premises by appellant for that period in an action of tort, or one prescribed by statute, but not in an action founded solely upon the lease. *Hinsdale v. White*, 6 Hill, 507; *Featherstonhaugh v. Bradshaw*, 1 Wend. 134; *Taylor's Landlord and Tenant*, 5th Ed., § 617.

The rent that accrued prior to the termination of the lease, namely, the rent for the month of August, 1878, could only be recovered in this action; but no rent for the subsequent months. *Hinsdale v. White*, 6 Hill, 507.

Messrs. SIDNEY C. EASTMAN and GEO. E. SWARTZ, for appellee.

The notice did not *per se* terminate the lease. *National Oil*;

Refining Co. v. Bush, 88 Pa. St. 341; Grove v. Barclay, 106 Pa. St. 164.

The suit for possession must be regarded as terminating the tenancy, and we think the judgment for possession the decisive act which annulled the lease. The lease provides that in case of default in any of its covenants and agreements, "it shall and may be lawful for the said party of the first part, her heirs, executors, administrators, agent, attorney or assigns, at her election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter."

Now, what is the just and proper interpretation of this covenant? The election is given, not only to declare the term ended, but to enter into possession of the premises as well. In determining the election of the landlord, and its effect, is it not highly proper to look at the whole covenant, and, if possible, give effect to all parts of it? Is the appellee to lose her rights and be deprived of her property because she chose rather to re-enter into the possession of the same by due process of law, than to commit a breach of the peace, and enter by force and arms? On the other hand, had not the appellant, the lessee, an undeniable right, a right as old as the common law, to insist upon a trial and ask that the proper tribunal determine whether there be a default, and if a default exist, whether it be of such a character as to allow the lessor to exercise her election under the lease, terminate the tenancy and enter into possession of the property? *Hartshorne v. Watson*, 4 Bing. (N. C.) 178.

Whether the lease was terminated, either upon the expiration of the notice, as by appellant alleged, or at some time subsequent to the expiration of the said notice, and prior to the judgment for possession, the appellant has expressly and in terms bound himself to be subject to all the conditions and provisions of the lease, in the event of the very things occurring, which have occurred, and which he now resists. In the next to the last paragraph of the lease commencing, "It is expressly understood and agreed," this appellant binds himself that "if at any time said term shall be ended at such election

of said party of the first part, her heirs, executors, administrators or assigns, as aforesaid, or in any other way, the said party of the second part, his executors, administrators and assigns do hereby covenant and agree to surrender and deliver up the said above described premises and property peaceably to said party of the first part, her heirs, executors, administrators and assigns, immediately upon the determination of the said term as aforesaid, and if he shall remain in possession of the same after such default, or after the termination of this lease in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premises under the statute, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcibly or otherwise, with or without process of law, as above stated." The lessee having thus bound himself that in such an emergency he would be subject to all the provisions of the lease, is now estopped from denying his liability. *Pickett v. Bartlett*, 3 N. Y. (L. Ed.) 405; 9 Cent. Rep. 831.

The Supreme Court of this State in *Clapp v. Noble*, 84 Ill. 66, say: "Although, technically, the notice to quit may be regarded as terminating a tenancy, the fact still exists that the lessee remains in the occupancy, and does not choose to sever the relation. It is just and proper, then, that he should be held amenable to all the presumptions that can be raised in such a case."

GARNETT, P. J. This is an action of covenant brought by appellee against appellant, to recover certain installments of rent alleged to be due on a lease of premises known as No. 59 Archer Avenue, Chicago, for a term beginning November 1, 1877, and ending November 1, 1882. The rent which appellant covenanted to pay, was \$35 per month, and he did pay the same to the month of August, 1878. Having made default in payment of the rent for that month, appellee, about the 15th of September, 1878, served upon him a written notice of termination of the lease in five days, if the rent was not paid within that time.

The rent remaining unpaid, the appellee, at the end of the

Johannes v. Kielgast.

five days, commenced suit in forcible detainer against appellant, which resulted in a judgment for possession in favor of appellee in February, 1879, the appellant having occupied until that date. This action of covenant was commenced March 5, 1886, and judgment was rendered by the court below for the rent for the months of August, September, October, November and December, 1873, and January, 1879, which appellant now seeks to reverse, on the ground that an action on his covenant can not be maintained for any rent accruing after the termination of the lease. The right of enjoyment is the correlative of the duty to pay rent.

Whenever the right of enjoyment is lawfully terminated, so that it can not be restored except by mutual consent, the covenant as to payment, ceases to be an obligation as to any installment, which, by the terms of the lease, would thereafter have become due. Authority in point is not wanting.

In *Jones v. Carter*, 15 M. & W. 718, the lessee's covenant was for the payment of rent on the 25th of March and the 29th of September of each year of the term. The installment due March 25, 1845, was paid, but on May 19, 1845, the lessor commenced ejectment against the lessee, for breach of covenant, there being a proviso in the lease that for any breach of covenant it should determine and be utterly void, and the lessor at liberty to re-enter. The action for rent was commenced in January, 1846, before the termination of the action of ejectment. The court, Parker, B., said: "Without inquiring whether an ejectment be a real action, the bringing of such would, according to the authority of Lord Coke, be a determination of an election between two remedies. It seems to us that so distinct and unequivocal an act, must, independently of any technical reason, be a final determination of the landlord's option; for, after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty after that time. We are all, therefore, of opinion, that

the lease was determined in May, 1845, and consequently the defendant was not liable to pay the subsequent rent, or damages for any breach of covenant."

In *Oldershaw v. Holt*, 12 Adol. & E. 590, where a like question was raised, the court held: "The re-entry must be considered as taking effect from the time of the demise relied on in the ejectment. From that period the defendant, while holding the premises, was a wrong-doer, and liable for mesne profits. The action should have been brought for those and not for rent."

The same rule is held in *Stuyvesant v. Davis*, 9 Paige Ch. 428. So, in the case at bar, the action should have been for mesne profits or for use and occupation. *Hartshorne v. Watson*, 4 Bing. (N. C.) 178, relied on by appellee, is not in conflict with the foregoing cases.

In the lease sued on there was a separate group of provisions to the effect that if any of the rent should be in arrears, or there should be any default in any of the covenants on the part of the lessee, it should be lawful for the lessor to declare the term ended and make entry with or without process of law and expel the lessee, using such force as might be necessary, and to distrain for any rent that might be due upon any property of the lessee, whether exempt from execution and distress by law or not, the lessee agreeing to waive his right to exemption; that it was the intention thereby to give the lessor a valid and first lien on all of the lessee's property, as security for the rent; and that in case of the ending of said term by election of the lessor, or otherwise, the lessee agreed to surrender the premises to the lessor peaceably, immediately upon such termination, and that if he should remain in possession of the same after such default, or after such termination of the lease, he should be deemed guilty of a forcible detainer and should "be subject to all the conditions and provisions above named."

For appellee it is contended that the clause making appellant subject to all the conditions and provisions above named, keeps the covenants in the lease alive, so that the lessee, although deprived of his estate, is still liable upon covenants

of the lease for any breach thereof happening after the termination of the lease by the landlord's election.

If that is the true interpretation, the lessee would be liable for the rent of the entire term, even if the lessor should have ended it in the second month for failure to pay the first month's rent, and that would be the case, if the lessee had only held possession one day after the termination of his estate. By insertion in the lease of words which the parties themselves did not see fit to use, we can make the instrument say that the lessee shall be liable on his covenants for all rents that may accrue while he shall so unlawfully occupy. But confining our attention to the words actually used by the parties, we must say that with reference to liability on the covenant for rent, they mean (1) that the tenant, in case he wrongfully holds over after the term is ended by election of the landlord, no matter when the election is made or for how short a time the holding over continues, shall be liable to his covenants for all the rent to the end of the term specified in the lease, or (2), that he is not liable on his covenants for any rent that accrues after the landlord's election.

We think this clause in the lease, upon which appellee relies, has no reference whatever to the payment of rent or the observance of the lessee's covenants after the termination of the lease, but merely to the condition of things presented to the minds of the parties by the separate group of provisions above set forth, to wit, the liability of the tenant to expulsion, forcible or otherwise, and to distress upon his property, his waiver of the right of exemption, etc.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

GARY, J., took no part in the decision of this case.

27	582
44	188
27	582
55	387
27	582
67	232

JOHN J. CURRAN, IMPL'D, ETC.,
V.
BRADNER, SMITH & COMPANY ET AL.

Corporations—Liability of Stockholders—Practice—Sec. 25, Act of 1872—

1. Creditors of corporations organized under or subject to the provisions of the act of 1872, pursuing their remedies against the holders of the stock wholly or partially unpaid, can do so, except so far as Sec. 8 applies, only in the manner provided in Sec. 25 of that act.

2 To enforce such liability the bill must be by or on behalf of all the creditors against all the stockholders.

3. This court reverses a decree which charges a single stockholder and makes no finding as to whether the assets of the corporation were exhausted.

[Opinion filed December 18, 1888.]

APPEAL from the Circuit Court of Cook County; the Hon.
OLIVER H. HORTON, Judge, presiding.

Mr. ELBRIDGE HANEY, for appellant.

Mr. JOHN S. STEVENS, for Bradner, Smith & Co., appellee.

Messrs. McCLELLAN & CUMMINS, for Parsons & Hicks,
appellees.

GARY, J. This was a bill in chancery filed by Bradner, Smith & Co., a corporation, against the Mail Publishing Company, also alleged to be a corporation, and appellant. Originally there was another defendant, not a stockholder, but as nothing in the case is affected by that circumstance, it is enough to say that as to that defendant, the bill was voluntarily dismissed. The appellant answered the bill. Afterward the appellees, Parsons and Hicks, partners as W. H. Parsons & Co., in a petition entitled in the suit then pending, prayed that they might be made parties complainant to the

bill. The bill alleged the recovery of judgment by Bradner, Smith & Co., against the Mail Publishing Company, an execution thereon returned unsatisfied, and that appellant was a stockholder, and his shares not paid for. The petition alleged the recovery of judgment by Parsons and Hicks, an execution, returned unsatisfied, and adopted the allegations of the bill. No rule to answer, nor any answer in fact, to the petition, was made upon, or by anybody. The Mail Publishing Company never answered anything, nor was anything, bill or petition, taken as confessed against them. There is no finding whether they were solvent or insolvent, or had any assets.

The record shows that the statutory proceedings for organizing the company were taken in February and March, 1884, resulting in the subscription for the whole capital stock of \$30,000, in shares of \$100 each.

The subscribers were E. R. Dillingham, Jr., 25 shares; E. C. Stevens, 50 shares; appellant, 75 shares, and R. E. McRea 150 shares. And on the 24th day of March, 1884, the subscribers for the shares met and elected a board of five directors. On the 29th of the same month the proper record in the office of the recorder was made. So far as the record shows, this was the last formal corporate act. No certificates of shares were issued, no executive officers elected, no by-laws adopted, no stock or other corporation books opened or procured.

Appellants, Dillingham and Stevens, with machinery furnished by appellant, and some money by the others, seem to have published a newspaper for a while, when appellant sold out to the other two for \$5,500 cash. The parties themselves seem to have forgotten or disregarded the steps they had taken to form a corporation, and treated the machinery of the appellant as the subject of the sale. Thereafter appellant gave no further attention to the business.

It is the doctrine of this court, and, as it is understood here, the doctrine of the Supreme Court, that creditors of corporations organized under, or subject to the provisions of the act of 1872, pursuing their remedy against the holders of stock wholly or partially unpaid, can do so (except so far as Sec. 8

applies, which has no reference to the mode of proceeding adopted in this case), only in the manner provided in Sec. 25 of that act. *Robertson v. Noeninger*, 20 Ill. App. 227; *Richardson v. Akin*, 87 Ill. 138; *Low v. Buchanan*, 94 Ill. 76; *Harper v. Union Mfg. Co.*, 100 Ill. 225; *Patterson v. Lynde*, 112 Ill. 196. See also, *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 191.

Under that section "a stockholder may be required to pay his *pro rata* share" of the debts of the corporation "to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation."

Sec. 8 declares the liability of the stockholder "shall be for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided." The word "herein" refers to the whole chapter, and not merely to that section.

It is true that none of the cases cited support in express terms the whole proposition, that to enforce the liability of the stockholders (except under the provisions of Sec. 8 by garnishment), a bill must be by, or on behalf of, all the creditors and against all the stockholders, but that proposition is a necessary result from them. The case in the 87th holds (overlooking the remedy by garnishment), the "remedy is limited to courts of equity." That in the 94th, that the liability to the creditors under Sec. 16, is "a trust fund to be collected and divided *pro rata* among all the creditors." In the 100th the bill to enforce the liability of stockholders under Sec. 9 of the act of 1857 "to the creditors" was dismissed partly because it was "brought but by one creditor, and in his own behalf alone," while the relief "could only be had upon a bill brought by, or at least in behalf of all the creditors of the corporation;" and in the 112th, in discussing the liability of a stockholder in an Oregon corporation, under the words, "shall be liable for the indebtedness of the corporation." it is said, "a decree that one stockholder should pay, or that one creditor should be paid, must be partial and incomplete, and might be grossly inequitable and unjust." The phrases "for the debts" (Sec 8), "to the creditors," (cases in 94th and 100th), and "for the indebtedness" (the Oregon

Wetenkamp v. Billigh.

case, 112th), express the same idea, and impose the same burden.

The bill in this case was in behalf of all creditors, but against a single stockholder.

Sec. 49 of the Chancery Act, has no application to cases of this character. If it had (a notion that seems to have occurred to nobody), the case in the 100th should have been decided the other way, for the only objections there were that the complainant did not file his bill on behalf of all the creditors, and make the assignee of the corporation a defendant. In enforcing the liability of stockholders, the rule that "equality is equity," both as to creditors and stockholders, however illusory it may prove in practice, is firmly established by authority.

As the decree in this case makes no finding as to whether the assets of the corporation were exhausted, and charges the appellant alone, not bringing in the other stockholders, it is directly contrary to the decision of this court in 20 Ill. App. 227, and must be reversed.

There are very serious questions relating to the organization of the corporation—whether the parties printing the paper were doing so as the agents of a corporate body, or were liable to the world as partners; if the latter, who were liable—that are left untouched, and as to which no inference is to be drawn from this opinion.

Reversed and remanded.

JOHN WETENKAMP ET AL.

V.

WILLIAM BILLIGH ET AL.

27	586
62	497
27	585
63	101

Mechanic's Lien—Notice—Signature—Joint Contract—Parol Evidence.

1. The notice required by Sec. 30, Chap. 82, R. S., should be dated and signed by the person claiming a mechanic's lien. Without signature the notice is fatally defective.

2. In the case presented, it is *held*: That the contract for the erection of the building constituted the mason and carpenter joint contractors; that parol evidence is inadmissible to show a different intention; and that a paper subsequently signed by the owner only, can not be regarded as a contract.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

MESSRS. HARRY RUBENS and ROBINS S. MOTT, for appellants.

MESSRS. MEYER & COLLMAN, for appellee.

GARY, J. About the 1st of November, 1885, the appellants, intending to build, received from Billigh this proposition:

“W. BILLIGH, 3006 Emerald Avenue, Mason, Builder and Contractor, of Chicago, Ill.

“I propose to furnish the building according to plans and specifications for the sum of seventy-four hundred and fifty dollars (\$7,450).

“W. BILLIGH.”

On the 4th of the same month this contract was made:

“This agreement made this fourth day of November A. D. 1885, by and between William Billigh and Henry Beck, parties of the first part, and Billigh & Beck, party of the second part, witnesseth, Wetenkamp Bros.

“That the parties of the first part, said William Billigh and H. Beck will build a house for the party of the second part ——— for the sum of \$7,450 (seven thousand four hundred and fifty dollars) according to the plan and specifications, the payments to be made in the following manner:

“First payment to take place when the basement is put up in the sum of one thousand dollars (\$1,000).

“Second payment when the first story is up, in the sum of one thousand dollars (\$1,000).

“And the balance, eleven hundred dollars (\$1,100), when the mason work is all finished.

Wetenkamp v. Billigh.

"Carpenter's first payment in the sum of \$400 (four hundred dollars) has to be made when second joist is up, the second payment in the sum of one thousand dollars (\$1,000) as soon as the roof is on, and the third payment in the sum of one thousand dollars (\$1,000) when the first coat of plaster is on and all the grading done.

"All the balance of the contract money has to be paid when the house is all completed and the keys turned over to the party of the second part.

"CHICAGO, November 4, 1885.

"300 \$ tree hundert dollars has to be paid after tirty days, after the building is furnicht on cairpender work.

"J. WM. WETENKAMP BROS.

"W. BILLIG,

"H. BECK,

"*Contractors.*"

Billigh was the mason and Beck the carpenter, and divided the work between themselves at the prices stated in the contract. Some three or four weeks afterward, the work, both mason and carpenter, having been begun, Beck brought to appellants, and they signed, this paper:

"This Agreement made this 4th day of November, 1858, by and between Henry Beck, party of the first part, and Wetenkamp Bro., party of the second part, Witnesseth: That the parties of the first part, said Henry Beck, will do the carpenter work and all other work to furnish the house and turn the key to the owner for the sum of fourty tree hundred and fifty dollars 4350\$ according to the plans and spesifications first payment to be made when second joist is up 400.00\$, secont paidmend is the sum of 1000.00\$ as soon the roof is on and the third paidmand in sum of 1000.00\$ when the first coat of paster and all the glasing is done. All the balance of the contract money has to be paid when the house is all completed and the keys turned over to the party of the second part.

"Three hundret dollars has to be paid 30 days after the building is furniched on carpenter work.

"WILLIAM WETENKAMP,
JOH. WETENKAMP."

The '58 in the date is a Teutonic transposition of '85. The mason work was done, but the carpenter not, and it cost the appellants more than the original contract price to finish the building.

Welin, a sub-contractor under Beck, filed a petition for a mechanic's lien on the building. The South Halsted Street Iron Works, as sub-contractors, also, under Beck, intervened and claimed a lien. Hlinka, as sub-contractor under Billigh, did the same.

Billigh and Beck answered, and claimed that although they were originally joint contractors for the whole building, subsequently the matter was changed to a separate contract by Billigh for the mason work, and by Beck for the carpenter work. No further statement of the pleadings is necessary to a decision of the case.

There was a decree in favor of Billigh, of Hlinka, and of the Iron Works, but all other claims for liens were dismissed. Whether the first two shall be reversed depends upon whether Billigh is to be treated as a contractor with Beck for the whole building, in which case the building, not having been completed by the contractors, and having cost the owners more than the contract price to finish, neither the original contractors or sub-contractors under either of them are entitled to any lien, except under special circumstances as to sub-contractors, that do not exist as to Hlinka, and which will be discussed in considering the claim of the Iron Works.

It is not denied that the original paper, dated November 4, 1885, notwithstanding the jumble that is made, is a joint contract by Billigh and Beck with the appellants. The court is to take it as the language, used under the circumstances by which the parties were surrounded, means. Bishop on Cont. Sec. 365, *et seq.*; Buckner v. Hamilton, 16 Ill. 487.

But the appellee, Billigh, insists that the parties themselves did not mean what the language they used means, and that their conversation at the time, and subsequent conduct, shows that they all regarded Billigh as the mason and Beck as the carpenter contractor, not respectively responsible each for the other's part of the work. But the rule that written contracts

Wetenkamp v. Billigh.

are not to be varied by parol evidence, is so familiar that it would be affectation to cite authorities in its support.

The paper last set out in the opinion is signed only by the appellants. It is not, of itself, a contract. *Waggeman v. Bracken*, 52 Ill. 468. From the parol evidence there is some difficulty in arriving at any satisfactory conclusion as to why Beck wanted it. There were no negotiations that led to it, nor was any new paper made between Billigh and the appellants. The most plausible reason that appears for the making of it is that Beck considered himself to be a contractor only for the carpenter work, and wanted something in his own hands, the original being in the hands of Billigh. But in whatever aspect that paper is viewed, it can not be considered as substituting separate contracts for the separate parts of the work for a joint contract for the whole. Neither Billigh, as original contractor, nor Hlinka, as sub-contractor under him, are, therefore, entitled to any relief from the appellants.

The South Halsted Street Iron Works claim that they complied with the various provisions of Chap. 82 concerning liens, and that after they served a notice the appellants paid more money to Beck than was required to pay them. The appellants deny the service of any notice.

Upon the conflicting evidence as to the service of the notice the decree would not be disturbed. The form of notice given in Sec. 30 contemplates that it shall be dated and signed by whoever is to claim the lien. The witness who testifies to the service of the notice says that he does not think it was dated, and does not know how it was signed, as the same establishment does business both under the name of the South Halsted Street Iron Works and Vanderkloot & Son. The Iron Works professes, as the name not being the name of an individual imports (*U. S. Ex. v. Bedbury*, 34 Ill. 459), to be a corporation, and their answer makes an exhibit of a supposed copy (none in fact being kept) of a notice under the corporate seal, signed by the secretary. The want of a date may, perhaps, be overlooked, as rights accrue from the date of service and not from any date on the notice, but, without a signature,

VOL. 27.] Germania Life Insurance Co. of N. Y. v. Klewer.

the owner has no notice of who claims the lien. The connection between the claimant and the lien must appear on the notice, as the owner has nothing but the notice for his guide.

The decree in favor of Billigh, of Hlinka, and of the South Halsted Street Iron Works must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge GARNETT, having tried this case in the Superior Court, takes no part in this decision.

THE GERMANIA FIRE INSURANCE COMPANY OF NEW
YORK

V.

EMIL KLEWER.

Fire Insurance—Other Insurance—Vacancy—Waiver—Agency—Evidence—Instructions.

1. Where the agent of an insurance company knew that a house was vacant when it was insured, the company can not claim a forfeiture under the clause providing that the policy should be void in case of vacancy.

2. An insurance policy providing against other insurance is not affected by a former policy which has become void by reason of the vacancy of the premises.

[Opinion filed December 18, 1888.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

On August 20, 1882, appellee procured from the Agricultural Insurance Company a policy of insurance for three years, insuring him against loss or damage by fire to the extent of \$500 on his frame house at Norwood Park, Illinois, and \$500 on his furniture therein, such policy containing a clause prohibiting other insurance, valid or invalid. Dunlap & Swift had,

prior to that time, sold the house and lot to appellee and received from him a mortgage or trust deed thereon to secure a part of the purchase money.

On May 19, 1883, a policy for \$1,000, was issued by the Hartford Fire Insurance Company to appellee, on the application of Dunlap & Swift, insuring him for three years against loss or damage by fire on the house, a clause in said policy declaring the same void in case of other insurance, or the vacancy of the house for ten days without written consent indorsed on the policy. This policy was delivered to Dunlap & Swift and no part of the amount named therein has ever been paid to appellee.

The premium for the latter policy was paid to Dunlap & Swift by appellee, he, at that time, authorizing them to procure the policy on their interest, as mortgagees, in the property. He never saw the policy, nor was he informed that it covered his interest, or designated him as the insured party, until after the building was burned.

On August 22, 1885, appellant issued its policy insuring appellee against loss or damage by fire for three years to the extent of \$500 on said house and \$500 on the furniture, providing therein that it should be void in case of other insurance. From August 20, 1882, until the latter part of September, 1885, the house was occupied as a dwelling by appellee, but he vacated the same some time in the last named month, with no intent of returning, and the same remained vacant from that date until destroyed by fire. On October 16, 1885, appellee procured the cancellation of the policy dated August 22, 1885, and appellant at the same time issued to appellee another policy for \$1,000 on the house alone, for a term commencing October 16, 1885, and ending August 22, 1888, providing therein that the policy should be void in case of other insurance or vacancy of the house.

When appellant's last policy was issued, its agent was informed by appellee that the house was vacant, but no consent was given by any of the companies by indorsement on any of the policies, to other insurance or vacancy of the house. The premises were about wholly destroyed by fire on November

VOL. 27.] Germania Life Insurance Co. of N. Y. v. Klewer.

15, 1885, and this suit was brought by appellee on the policy dated October 16, 1888.

The defense was (1) other insurance, (2) vacancy, (3) the alleged burning of the building by plaintiff.

There was a verdict and judgment for appellee from which this appeal is taken.

MESSRS. HARRY RUBENS and ROBINS S. MOTT, for appellant.

The policy of insurance issued by the Hartford Insurance Company was invalid during the existence of the prior policy in the Agricultural Company, but the Agricultural policy remained valid. *Jackson v. Mass. Mutal Fire Ins. Co.*, 23 Pick. 418; *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush. 342; *Hardy v. Union Mutual Fire Ins. Co.*, 4 Allen, 217; *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Gee v. Cheshire County Mutual Fire Ins. Co.*, 55 N. H. 65.

Upon the expiration of the period covered by the Agricultural policy, to wit, August 20, 1885, the Hartford policy attached and was valid insurance from that date. *N. E. Fire & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573.

For able reviews of this question and the authorities, see *Hubbard & Spencer v. The Hartford F. Ins. Co.*, 33 Iowa, 326; *Gee v. Cheshire Mut. Fire Ins. Co.*, 55 N. H. 65; *Sutherland v. Old Dominion Ins.*, 31 Va. 176. See also, *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; *Stacey v. Franklin F. Ins. Co.*, 2 Watts & S. 506; *Philbrook v. N. E. Mut. F. Ins. Co.*, 37 Me. 137, *Schenck v. Mercer Mut. F. Ins. Co.*, 4 Zab. (N. J.) 447; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Thomas et al. v. Builders M. F. Ins. Co.*, 119 Mass. 121.

The first policy is not affected by a mere futile attempt to procure other insurance.

It is admitted that the premises were vacant from September, 1885, until the fire in November following; this increased the risk and was contrary to the terms of the policy, there being no written consent of the company thereto, and appellee can not recover. *American Ins. Co. v. Padfield*, 78 Ill. 167; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Agricultural Ins. Co. v. Frith*, 21 Ill. App. 593; *American Ins. Co. v. Foster*, 92 Ill. 334.

And even though the agent of the company knew of such vacancy at the time of the issuance of the policy, yet the policy did not attach, but if the premises had afterward become occupied it would have been in force. *Ins. Co. of N. Am. v. Garland*, 108 Ill. 220.

Mr. H. W. DIKEMAN, for appellee.

GARNETT, P. J. Appellant claims that the Hartford policy was not a valid insurance until the expiration of the term of the first policy issued by the Agricultural Insurance Company, that is, on the 21st day of August, 1885, but that it became operative on the last named date, and so remained until after the issue of the policy sued on. If that be so, we are not informed how the liability of the Hartford Company was continued more than ten days after the house became vacant.

Its policy provided that the insurance should be void if the house became vacant and so remained for ten days, and the proof is uncontradicted that the house was vacant and unoccupied for more than ten days before the policy sued on was issued.

That being the fact there was no other insurance on the premises on October 16, 1885. *American Ins. Co. v. Padfield*, 73 Ill. 167; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *American Ins. Co. v. Foster*, 92 Ill. 334.

The vacancy of the building, however, is no defense for appellant. When the policy sued on was issued, the house was unoccupied, and had been in that condition for several weeks. Of this appellant's agent had full notice when the policy in question was issued. No objection was then made to the vacancy, nor did appellee promise to have the house occupied. The injustice of permitting appellant to now deny its liability on that ground is apparent. To deliver a policy with full knowledge of the facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume, but prefer to find there was an intent to waive the known ground of avoidance. *May on Insurance* 497. A review of the evidence, for the purpose of refuting

VOL. 27.] Germania Life Insurance Co. of N. Y. v. Klewer.

the proposition that the appellee burned the building, would not be, under existing circumstances, a suitable employment of the time of this court. It is sufficient to say that the question was fairly submitted to the jury, and we think their finding for appellee is supported by the evidence; and it meets with our approval.

There was no error in the instructions given for the plaintiff, or in the modification of those requested by the defendant.

No wrong has been suffered by appellant, nor is there in the record any technical departure from the approved rules. The judgment is affirmed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1887.

D. D. ALLING
V.
CAROLINE A. P. BRAZEE, ADMINISTRATRIX.

*Book Account—Death of Debtor—Admission of Books in Evidence—
Sec. 3, Chap. 51, R. S.*

1. A plaintiff who has made the proper preliminary proof may produce his books of account in evidence in an action against the administratrix of the debtor.

2. Testimony of a creditor, in the absence of specific objection, that a certain account book "was his book account and kept by him," is sufficient preliminary proof to warrant the introduction of the same in evidence.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Winnebago County; the
Hon. O. H. HORTON, Judge, presiding.

Mr. A. D. EARLY, for appellant.

Mr. R. F. CRAWFORD, for appellee.

LACEY, J. This suit was originally brought before a justice of the peace by the appellant, who recovered in that court,

and the cause was appealed to the Circuit Court, where, upon trial by the court without a jury, it found in appellee's favor and gave judgment against appellant for costs, from which judgment this appeal is taken. The suit was originally brought against C. M. Brazee, the intestate of appellee, and judgment in the justice court was rendered against him, but at the trial in the Circuit Court C. M. Brazee had become deceased, and appellee had been appointed administratrix of his estate.

The action was based on a book account which the appellant presented against the deceased, C. M. Brazee. There was evidence in the case before the Circuit Court tending to show that C. M. Brazee, deceased, admitted the account, but it was weak and unsatisfactory.

The main point urged for reversal, is the refusal of the court to admit the book of accounts of appellant in evidence. The appellant was called as a witness and testified that he was the plaintiff; "that the book now shown me is my book account where I kept my accounts of my work. It is a book of original entries, kept by me; is true and just. The account before me in this book is the account against Mr. Brazee."

The appellant then offered the book in evidence, to which the appellee objected, and the court sustained the objection, to which ruling of the court the appellant excepted.

The correctness of this ruling is now questioned. It will depend on the proper construction to be given to Sec. 3, Chap. 51, R. S., concerning evidence. It reads as follows:

"Where, in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just."

Sec. 1 provides: "That no person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such

witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence."

Then follows Sec. 2, limiting the operation of the above section, which reads as follows: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard or lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called on as a witness by such adverse party so suing or defending, and also except in the following cases, namely:"

Then follow five different exceptions to the above inhibition, or rather exceptions to the exceptions to said Sec. 1.

There is some objection made by appellee's counsel that the appellant did not, even if entitled to testify to the preliminary facts under said Sec. 3, make the necessary proof that the entries were made by himself. That it was not sufficient for him to swear that the book "was kept by him." We do not think the objection is well taken. If the proof had not been satisfactory, instead of a general objection to its introduction in evidence, it should have been objected that the preliminary proof was insufficient, when it could have been remedied.

The proof, we think, was sufficient, and the statute substantially complied with. *Presbyterian Church of New Boston v. Emerson*, 66 Ill. 269. We do not think that Sec 2 was intended to be an exception to the provisions of Sec. 3. The language of Sec. 2 is, "no person, etc., shall be allowed to testify, etc., in his own behalf by virtue of the foregoing section." And the "*foregoing section*" is number 1 and not number 3.

No. 3 appears to be an independent section standing by itself, to the provisions of which there appears to be no excep-

tion named in the act. How the exceptions contained in number 2, which are limited to provisions of Sec. 1, can apply to Sec. 3, we are unable to see. The first section, no doubt, in providing that "no person shall be disqualified as *a witness*," etc., etc., means that "no person should be disqualified as a *general witness*," etc.

If this were not so there would have been no necessity for the enactment of Sec. 3. The proof which the plaintiff is allowed to make by Sec. 3, is in its nature preliminary proof, like that of the common law proof of the loss of deeds to enable the contents of the original to be shown by parol, or according to present statute, the record to be read. At common law, in many of the States a party might make the preliminary proof necessary to introduce books of account by his own oath. *Strickland v. Wynn et al.*, 51 Ga. 600. The decision in that case allowed preliminary proof in the nature of the evidence offered here, to be made by the plaintiff, notwithstanding the debtor was dead, and the case defended by the administrator. The statute of Georgia contained provisions nearly exactly like Secs. 1 and 2 of our statute.

The decision was made on the basis that by common law the plaintiff could make such preliminary proof by his own oath prior to the passage of the statute and the statute did not repeal the law as it had existed. The statute contained no such provisions as section number three.

In North Carolina a statute similar to the provisions of Sec. 3 had existed for a long time, when a statute similar to Secs. 1 and 2 of our statute was enacted. In *Leggett v. Grover et al.*, 71 N. C. 211, where a similar question as is here presented was raised as to the effect of the last statute on the first, it was held that the last did not repeal the old one. If Sec. 3 had been passed at a different time from Secs. 1 and 2, the case would have been similar to the case last above cited.

It could make no difference that our act is all in one. The statute in regard to evidence seems to be a general amendment of the common law rules on the subject of evidence and its production. At common law a party might introduce in evidence his books of account, provided he made certain prelim-

Alling v. Brazee.

inary proof. He was required to prove by evidence of disinterested witnesses the following points, to wit: That he kept no clerk; that the books were his books of account; that they were books of original entry; that the entries therein were in his handwriting; that they had settled by the same books and found them just and true; that some of the articles charged or work done were delivered or done about the time charged. *Boyer v. Sweet*, 3 Scam. 120.

This rule, as to the admissibility of a party's account books, was an exception to the general rule of the common law, that no party was allowed to testify in his own behalf, or produce evidence that he had made himself, and grew out of the necessities of the case, and was intended to prevent a failure of justice, as in many cases a party would be wholly unable to prove his accounts unless he could introduce his account book in evidence; but the right to so introduce the account book was hedged around with the foregoing preliminary conditions in order to protect the rights of the party against whom the account book was to be introduced, and to prevent fraud and imposition. The common law was extremely rigid and excluded every one from being a witness who had any interest in the event of the suit. There were one or two other exceptions to the general rule; one was that in a suit against a common carrier for the loss of baggage in carriage, the plaintiff was allowed to testify in his own behalf as to what articles were contained in the package and their value. This exception also was adopted through necessity and to prevent the failure of justice. These exceptions held good not only in case the suit was brought against the debtor in his lifetime or against his administrator. They were of universal application.

In the course of time experience taught that the old common law policy, to exclude all persons from being witnesses who had any interest in the event of the suit, was not calculated to work for the general good of society, and a great change, though quite recent and long delayed, took place by the enactment of statutes repealing the old common law in that regard and allowing all parties to testify, with some limitations. The wonder is now with members of the bar and the general public

how such an illiberal and narrow rule as the common law rule could ever have existed and why it was followed so long.

In regard to the requirements of the common law rule in respect to the introduction of account books it was found the preliminary proof required was in most instances exceedingly hard to make and in many cases could not be made; that the rule was so stringent that in many, and perhaps a majority of cases, the account books could not be introduced on account of the impossibility to make proof of some one or more of the required facts to be proven. So the legislature, in the act generally liberalizing the common law rule of evidence, took cognizance of this rule in regard to the introduction of books of account and it came in for amendment; and was enacted as it was found in Sec. 3 above quoted, without limitations.

It may be more proper to say that it was repealed and superseded by the new enactment in regard to it. *Presbyterian Church, etc., v. Emerson*, 66 Ill. 269. But, as we think, like the old rule on the same subject, it was intended, like it, to have unlimited application without regard to the parties to the original transaction being dead or alive. Judging as well from the reason of the rule as the structure of the statute, as we have shown, we must hold that there is no limitation to the operations of the law as enacted in Sec. 3; that the appellant, having made the necessary preliminary proof, was entitled to have his books of account admitted in evidence, and that the court erred in refusing it.

Sec. 3 does not allow a party to testify generally to the items of his account any farther than is particularly specified in the section. He can not be a general witness as to the items. It is not necessary to discuss other questions. The judgment is, therefore, reversed and the cause remanded.

Reversed and remanded.

MORRIS & LEWIS
v.
JOHN M. RETICKER.

Sales—Fraud—Instructions.

1. The mere suppression of facts as to his financial standing by a purchaser of goods, is not fraudulent, unless his intention is to obtain possession of the goods and not pay for them.

2. It is not error for the court to modify an instruction when the effect is simply to express the law applicable to the case.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Rock Island County;
the HON. ARTHUR A. SMITH, Judge, presiding.

Messrs. W. H. GEST and P. O'MARA, for appellants.

Messrs. PLEASANTS & HURST, for appellee.

LACEY, J. The appellants sued the appellee, who is the sheriff of Rock Island county, in an action of replevin to recover certain goods purchased by Willard G. Nickerson of appellants, residing and doing business in Philadelphia, Pennsylvania, and, before replevin, levied on by the appellee as the property of Nickerson, by virtue of certain executions issued out of the County Court of said county, one in favor of L. S. McCabe and one in favor of Wm. Meyer, against Nickerson, which judgments were confessed by said Nickerson.

The appellants claim that the sale by them to Nickerson of the goods in question was fraudulent on the part of the latter, and that they have a right to retake the goods as against the execution creditors of Nickerson; that the latter are not *bona fide* purchasers without notice, and that they simply stand in Nickerson's shoes. It is claimed by appellants that the fraud complained of by them was in the conduct of Nickerson at the time of the purchase of the bill of goods in controversy,

of Wm. E. Somers, the traveling salesman of appellants, in that Nickerson made false and fraudulent representations in regard to his financial ability, which induced the sale, and also suppressed certain facts within his knowledge, with intent to defraud appellants by obtaining possession of the goods with intent not to pay for them. As to the alleged charge of false and fraudulent representations on the part of Nickerson, it is wholly denied by him, while they were testified to by Somers. It became a question as between those two witnesses, which the jury would believe; and we are unable to say that it was not justified in believing the testimony of Nickerson to the exclusion of that of Somers. Then the suppression of certain facts by Nickerson from Somers at the time of the purchase consisted in not disclosing to Somers the existence of certain judgment notes outstanding against Nickerson, including the notes upon which the judgments in favor of the execution creditors in this suit are based, amounting to about \$1,500. It may also be properly claimed that he suppressed the further fact that he was indebted for goods to about the amount of \$1,300 besides. It would not be a fraud in law, arising from the mere circumstance that these facts were suppressed, or other facts of like character, sufficient to annul the sale at the option of appellants, but in connection with the fact of such suppression it must further appear that it was done with the intent to get possession of the goods and not to pay for them. Or to authorize the court to instruct the jury, as though it were a matter of law, the *suppressio veri* must be under such circumstances as to lead irresistibly to the conclusion that such was the intent, and where the court could pronounce that, no jury would be justified in finding otherwise. On the question of the fraudulent intent on the part of Nickerson, as well as on the charge of false representation, we do not feel at liberty to hold that the jury were not justified in finding the issue for the appellee.

The appellants complain, also, of the action of the court below in modifying instructions Nos. 2 and 5, asked for by appellants, and the giving of them as modified. The objec-

Lewis v. Reticker.

tions made to the modification of the instructions are more in the nature of mere verbal criticism than of substance. It is claimed that the instructions, as asked, contained the hypothesis that the supposed suppression must have been made with the intention on the part of Nickerson not to pay for the goods, and that the modifications, while they presented the same idea, were couched in too strong language, being liable to mislead the jury in giving it to understand that the proof must show that "a crime was committed by Nickerson in the purchase of the goods." We do not think the criticism is just. The words used by the court in its modification were that the suppression of facts must have been with the intent on Nickerson's part to "cheat and defraud" when he bought them (the goods) or "with intention of cheating plaintiffs." The words used by the court imply no more than the law requires to make out appellant's case. There must be an actual intent and purpose on the part of the purchaser in suppressing the material facts to obtain possession of the goods by such means, and not to pay for them. This amounts to cheating and defrauding. Besides, the expression used by appellants' second offered instruction, "and did not intend to pay for the goods," is rather weak. This might imply that while he had no intention *not to pay for them*, he made the suppression without *positive intention to pay for them*. The jury might infer from it, if such a thing were possible, that if Nickerson's mind in making the suppression in regard to paying for the goods was in a state of careless indifference, or inert on the subject, or he had not present or positive intention to pay for them, he would still be guilty of fatal fraud in suppressing the facts. It were better to make it plain to the jury what the law was, as the court did, by the modifications. The refusal on the part of the court to give appellant's 6th, 7th and 8th instructions asked for, was not error. Each of them, as asked, omitted the hypothesis that the suppression must have been with intent not to pay for the goods, and the law was fully given in other instructions. We had occasion to fully consider the question of the sufficiency of similar instructions as those named in the case of Reticker v. Kotzen-

VOL. 27.]

City of Rockford v. Falver.

stein & Wachtel, 26 Ill. App. 33, and held them insufficient and reversed the judgment for such reason, citing Henshaw, v. Bryant, 4 Scam. 97; Patten v. Campbell, 70 Ill. 72; Morrill v. Corben, 13 Ill. App. 31; Catlin v. Warren, 16 Ill. App. 413; Flower v. Farwell, 18 Ill. App. 254, 341.

We see no error in the giving of appellee's second and third instructions. They were not liable to mislead in the respects complained of. On the whole the jury was fairly instructed as to the law of the case.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

CITY OF ROCKFORD

v.

MARY FALVER.

Municipal Corporations—Personal Injury—Dangerous Sidewalk—Ice and Snow—Negligence—Evidence—Privileged Communications—Instructions.

1. A statement made by a witness to an attorney, no relation of attorney and client existing between them, is not a privileged communication.

2. Evidence as to the extent of a city's streets, is not admissible in an action brought to recover for injuries suffered because of an alleged failure to remove snow and ice from a sidewalk.

3. The appellant can not complain of an instruction given at the request of the appellee, which is substantially like one given upon his own request.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Winnebago County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. A. E. HOLT and MARSHALL & TAGGART, for appellant.

The instructions ignore the doctrine of the law, that the snow and ice, under the circumstances of this case, must con-

City of Rockford v. Falver.

stitute an obstruction, or defendant can not be held liable. The case of *City of Aurora v. Parks* was reversed for error in giving instructions as to the duty of the city in regard to accumulations of snow and ice, similar to the instructions in this case. The court says: "They (the instructions) authorize the jury to find for appellee, if the sidewalk was unsafe and dangerous from ice and snow accumulating thereon, even though it had not accumulated to the extent to cause an obstruction. There may have been sufficient ice and snow on the walk to make it slippery, rough, uneven, dangerous and unsafe, and yet the appellant not be liable. To render the appellant liable, the ice and snow must have accumulated to such an extent as to cause an obstruction. Mere slipperiness and unevenness caused by the tramping, thawing and freezing, where the ice and snow has not accumulated to such an extent as to make it an obstruction, does not create a liability. These instructions are in conflict with the rule announced by the Appellate and Supreme Courts of this State. The *Village of Gibson v. Johnson*, 4 Ill. App. 288; *City of Macon v. Smithers*, 6 Ill. App. 47; *City of Chicago v. McGiven*, 78 Ill. 347; *City of Quincy v. Barker*, 81 Ill. 300; *City of Chicago v. Bixby*, 84 Ill. 82. They should not have been given." *City of Aurora v. Parks*, 21 Ill. App. 459.

Messrs. N. C. WARNEE and HARRY B. ANDREWS, for appellee.

In New York, Massachusetts, Maine, Connecticut, Pennsylvania, Wisconsin and Iowa the courts of last resort have repeatedly sustained verdicts for personal injuries resulting from falls upon sidewalks which have been suffered and permitted to remain burdened with "large and unusual accumulations of snow and ice." *Evans v. City of Utica*, 69 N. Y. 166, 171; *Todd, Adm'r, v. City of Troy*, 61 N. Y. 506, 511; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 471; *Luther v. Worcester*, 97 Mass. 268, 271; *Morse v. Boston*, 109 Mass. 446; *McAuley v. Boston*, 113 Mass. 503; *Gerald v. Boston*, 108 Mass. 580; *Collins v. Council Bluffs*, 32 Iowa, 324; *Dooly v. Meriden*, 44 Conn. 117; *Cloughessey v. Water-*

V. L. 27.]

City of Rockford v. Falver.

bury, 51 Conn. 405, 420; *Cromarty v. Boston*, 127 Mass. 329; *Darling v. Westmoreland*, 52 N. H. 413; *Baltimore v. Marriott*, 9 Md. 160, 178; *Flynn v. Baltimore*, 40 Md. 324.

Whether a snow hummock is a defect is a question for the jury. *Gerald v. Boston*, 108 Mass. 580. Whether a walk is obstructed so as to be perilous to footmen is for the jury, subject only to the general qualification that all verdicts must rest on some evidence. *Nebraska City v. Rathbone*, 29 N. W. Rep. 923. Whether a sidewalk is reasonably safe or dangerous is a question for the jury. *Whitney v. Milwaukee*, 57 Wis. 639. It was for the jury to draw the inference and form the opinion whether walking in consequence of ice was more difficult than usual. *City of Rockford v. Hildebrand*, 61 Ill. 159. The degree of care required of the plaintiff is a question for the jury. *Palmer v. Dearing*, 93 N. Y. 10. Whether sufficient time had elapsed to charge the city with constructive notice is a question of fact for the jury. *Rehberg v. Mayor, etc.*, 91 N. Y. 144.

Questions of negligence and of contributory negligence are ordinarily for the jury, and should not be withdrawn from their consideration unless the facts clearly warrant it. *Born v. Plank Road Co.*, 101 Pa. St. 334. It is for the jury to decide whether the corporation has used ordinary care and whether the sidewalk was reasonably safe. *Hall v. Lovell*, 10 Cush. 260.

Whether it was consistent with due care for appellee to proceed to cross the walk, was a question for the jury. *South Bend v. Hardy*, 98 Ind. 586; *Pomfrey v. Village, etc.*, 104 N. Y. 469.

All the law required appellee to do was to pass over in a careful and guarded manner. *Owen v. Chicago*, 10 Ill. App. 472; *Lovenguth v. Bloomington*, 71 Ill. 238; *City of Rockford v. Hildebrand*, 61 Ill. 158.

LACEY, J. This was an action on the case brought by the appellee to recover damages from the appellant for negligence on its part in neglecting to keep one of the sidewalks of the city free from an unreasonable and dangerous accumulation of ice and snow by means of which, while in the exercise of ordinary care, she slipped and fell, breaking her leg in the fall.

The cause was tried by a jury which found appellant guilty and assessed appellee's damages at \$800, upon which verdict judgment was rendered.

The main cause urged by the appellant for reversal is that the appellee's instructions were erroneous in that they did not conform to the rule of law as laid down by this court in the *City of Aurora v. Parks*, 21 Ill. App. 462, in which case it was held that before a city can be made liable for damages occasioned by persons falling on the sidewalk by reason of the accumulation of ice and snow such accumulation must amount to an *obstruction*. In that opinion this court followed various decisions of the courts of last resort of other States, as well as the Supreme Court of this State, cited in that opinion.

We are of the opinion that the appellant is not in a position to take advantage of any failure in the instructions in question to conform to the rule announced in the *Parks* case, if they do fail, for various reasons. First, the evidence very clearly shows that there was a very serious obstruction on the sidewalk in question which was one of the most frequented streets in the city, caused by the accumulation of snow and ice in ridges in the center of a narrow sidewalk from eight to eighteen inches in height, there being very little reliable testimony to the contrary. The jury, as we think, could not have reasonably found otherwise.

Secondly, the instructions given at the instance of the appellant as well as for appellee agree; and by them the jury were plainly told that if the sidewalk was *rendered unreasonably unsafe* by such accumulation of ice and snow, and the city had notice, then, if the accident was occasioned thereby, that would be sufficient to render the city liable, if the appellee was in the exercise of reasonable care for her own safety. The point now made as to the law seems to be an afterthought. The appellant can not be allowed to ask the court on the trial to instruct upon one theory of the law and, when it fails on the trial, appeal to this court and assign for error the giving of similar instructions on the part of appellee.

That would be to trifle with justice. The question in issue being the dangerous condition of the sidewalk occasioned by

the accumulation of ice and snow, the appellant by its second instruction procured the law to be laid down by the court to the jury as follows: "Its (the city's) duty is only to use reasonable care to see that its sidewalks are reasonably safe for persons exercising proper care and caution in using them."

By the third of appellant's instructions the jury were told that "obstructions or defects in the sidewalk of a city to make the corporations liable for an injury occasioned thereby must be of such a nature that they are in themselves dangerous, or such that a person exercising proper care and prudence can not avoid danger or injury in passing them."

The fourth of appellant's instructions recognizes the same rule by implication. The instructions given for appellee only laid down the same rule in substance although it may be more clearly and in different words.

Next we come to the question of the ruling of the court on admission and exclusion of evidence. While the admission of evidence that the sidewalk where the accident happened was cleared off after the accident, might have been improper and incompetent to show that the city recognized its dangerous condition, if such was its purpose, we do not consider it, even if error, to be of sufficient gravity to cause reversal. Nor was it error to refuse to allow the appellant to show the extent of its sidewalks.

If the city was large and had a great extent of sidewalks it should be reasonably supplied with appliances commensurate with the work to be done in clearing them of snow. It would appear also that the time during which the sidewalk was obstructed with ice and snow was ample for the city to have cleaned it off.

The evidence allowed by the court in behalf of the appellee that the city was provided with appliances to remove snow speedily was in excess of what was necessary under the circumstances and could do no harm. If the obstructions were dangerous, then we think it clearly appeared that the city had ample time to remove them and the jury was justified in so finding.

We do not think it was error to admit the evidence of

George M. Blake, who had been the attorney of appellant on the trial of this cause at a former term of court. Hart, the street commissioner, had been called as a witness by appellant, and testified that he had caused the sidewalk in question to be cleared of ice and snow January 24, 1886. Blake was called to show that Hart, at the former trial, had been consulted by him in reference to the clearing the sidewalk and that when questioned he failed to state to Blake that the sidewalk had been cleared. That Hart appeared to know nothing about when the sidewalk had been cleared. That he did not know whether the sidewalk had been cleared or not. That he, Hart, then examined his time book and reported to Blake that the time book showed that the men had worked, but where they had worked or what they did the book did not show.

This evidence was given in for the purpose of impeaching the witness Hart and we can not regard this knowledge obtained by Blake from Hart as privileged. The evidence was of a negative character and personal to Hart and only bore on his veracity. It was not evidence tending to show by any knowledge obtained by Blake that the city did not clear the sidewalk. In *Granger v. Warrington*, 3 Gilm. 299, it was decided that communications made by a party to a State's Attorney in reference to a proposed criminal prosecution were not privileged, but might be given in evidence by such State's Attorney against such party in a civil action in which he was a party. In that case the following citation was quoted with approval: "But the privilege of exemption from testifying to facts actually known to the witness is in contravention to the general rule of law. It is therefore to be watched with some strictness and is not to be extended beyond the limits of the principle of policy upon which it is based. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other as an interpreter, agent, or attorney's clerk. And this principle is confined to counsel and attorneys when applied to as such and when acting in that capacity." *Wilson v. Russell*, 4 T. R. 753. Under this rule we think that communications made by

a street commissioner to an attorney for a municipal corporation on matters of this kind should not be regarded as communications made by the city to its attorney in confidence.

It is true, Blake learned these facts when he was acting as corporation counsel, yet they were not communications made by the city to its attorney by virtue of the relationship of client and attorney. Hart was only a witness and made the statement as a witness and not as agent of the city. We are of the opinion it would clearly be without the reason of the rule to regard these as privileged communications. Blake is only called on to state what he has learned or failed to learn from Hart, a witness, which tends to contradict and impeach him upon his being offered as a witness by the city and swearing to a different state of facts.

Blake was not the attorney of Hart, nor was Hart the agent of the city to make the communications. Seeing no error in the record of sufficient importance to reverse the judgment it is therefore affirmed.

Judgment affirmed.

DANFORTH S. CLARK ET AL.

v.

OSMAN J. WILSON ET AL.

Assignment—Fraudulent Conveyance—Bill to Set Aside—Evidence—Acknowledgments.

1. An acknowledgment of a deed to which is attached the notary's seal, without his signature, is insufficient.
2. The record of an unacknowledged deed will not be received as evidence of its execution.
3. Conveyances can not be proved by parol, nor the execution of a deed by the admissions of persons not first shown to have been in privity with the title under which the grantee claims.

[Opinion filed May 28, 1888.]

SECOND DISTRICT—DECEMBER TERM, 1887. 611

Clark v. Wilson.

IN ERROR to the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. BULL, STRAWN & RUGER, for plaintiffs in error.

If the acknowledgment to the deed was imperfect, still the recording of the deed was notice to subsequent purchasers of all it contained. Starr & C. Ill. Stat., Ch. 30, Sec. 32; Reed et al. v. Kemp, 16 Ill. 445; Stebbins v. Duncan, 108 U. S. 32.

A deed may be valid and binding on the parties to it without any acknowledgment. Semple v. Miles, 2 Scam. 315; McConnell v. Reed, 2 Scam. 371; Robinson et al. v. Robinson et al., 116 Ill. 250; Roane v. Baker et al., 120 Ill. 308.

And the execution of the deed may be proved by admissions of the grantor or any other competent evidence. Dundy v. Chambers et al., 23 Ill. 369.

It is hard to see how the court below could dismiss the bill as to Boozle and Abram Wilson under the evidence, unexplained and uncontradicted. The evidence raised a strong presumption of fraud, and therefore it devolved upon Boozle to prove that he paid the purchase money for the property. Draper v. Draper, 68 Ill. 17; Brown et al. v. Welch, 18 Ill. 343.

Whatever circumstances convince the mind that fraud has been perpetrated are sufficient to prove it. Bryant et al. v. Simoneau et al., 51 Ill. 324; Reed v. Noxon, 48 Ill. 323; Carter v. Gunnels et al., 67 Ill. 270.

Messrs. McDougall & Chapman, for Henry Boozle, defendant in error.

The record of the alleged deed of Abram Wilson to O. J. Wilson, under date of October 20, 1833, is not competent evidence, for the reason that the certificate of acknowledgment is not signed, and no effort was made to secure and make proof of the execution of the original, if, indeed, any such deed ever existed. Ill. Stat., Chap. 30, Sec. 21, Starr & Curtis' Ed., p. 580; Ill. Stat., Chap. 30, Sec. 32, Starr & Curtis' Ed., p. 596; Reed v. Kemp, 16 Ill. 445.

The rule is well settled that the declarations of a vendor

Vol. 27.]

Clark v. Wilson.

after sale of land are not admissible to impeach the title of his vendee. *Fyffe v. Fyffe*, 106 Ill. 646.

The admissions and declarations of a grantor of land made when the grantee is not present can not be admitted in evidence to invalidate his deed or to affect his grantee. *Bentley et al. v. O'Brien et al.*, 111 Ill. 53.

The statements of a vendor of land made after the sale are not admissible for the purpose of showing the transaction was fraudulent, or to prove any other fact affecting the title of the vendee. *Gridley v. Bingham*, 51 Ill. 153; *Minor v. Phillips*, 42 Ill. 123; *Myers v. Kinsey*, 26 Ill. 36; *Simpkins v. Rogers*, 15 Ill. 397.

The alleged declaration of O. J. Wilson to George McDonald, in October, 1884, is not competent, for the reason that, though made prior to the deed of said O. J. Wilson to Abram Wilson, December 18, 1884, the defendant in error, O. J. Wilson, at that time had not, so far as this record shows, any title to or interest in said premises, nor was he in possession thereof, nor had he ever been the owner or in possession thereof; nor would the sale have been different had he been the owner and in possession thereof if made in the absence of Henry Boozle. *Wash. Real Prop.*, Vol. 3, Sec. 53, p. 638, 4th Ed.; *Barrett v. French*, 1 Conn. 635; 6 Am. Dec. 241; *Pettibone v. Phelps*, 13 Conn. 445; 35 Am. Dec. 88, and note.

The admission of O. J. Wilson in his answer that, prior to December 18, 1884, he held the legal title to said premises, and the confession of Abram Wilson, by permitting a default to be taken against him, can not be regarded as evidence against Henry Boozle, their co-defendant. *Russ et al. v. Mansfield et al.*, 25 Ill. 338.

Messrs. MAYO & WIDMER, for John J. Wilson, defendant in error.

LACEY, J. This was a bill brought by the plaintiffs in error, judgment creditors of defendant in error, Osman J. Wilson, in aid of the assignee for the benefit of the creditors of said Wilson, the assignee neglecting and refusing to bring the suit.

It was sought by the bill to set aside certain deeds, mortgages, notes and acknowledgments of indebtedness executed and made by the said Wilson to different parties shortly before the execution of the deed of assignment by him, as fraudulent and void and as in fraud of the assignment.

Upon final hearing the Circuit Court rendered a decree in said cause granting complainants certain relief and refusing certain other relief asked for.

Among the matters of relief asked for by the plaintiffs in error was the setting aside as fraudulent a certain supposed deed, executed by said Osman J. Wilson, the assignor, and wife, prior to his assignment (Dec. 18, 1884) to Abram Wilson in consideration of \$1, as named in the deed, for the west one-half of lot 19 in Earlville, and also a deed on the same lot executed by said Abram Wilson and wife to Henry Boozle, one of the respondents, December 20, 1884, for a consideration named in the deed of \$3,000, and also a certain promissory note executed by the said O. J. Wilson to his son John T. Wilson for the sum of \$1,000 executed December 18, 1884, just prior to the assignment.

The court below refused the relief asked as to the above named deeds and note and dismissed the bill as to Abram Wilson and Henry Boozle, no relief being sought as to them except as to said deeds, but held and decreed, as regards the note of \$1,000 given to John T. Wilson, that it be allowed as a claim against the said estate of O. J. Wilson to be paid *pro rata* the same as other claims.

The above ruling and action of the Circuit Court is all that is sought to be reversed on this writ of error.

It appears from the evidence that Abram Wilson was the owner of the said half lot in Earlville as far back as April 18, 1883, by deed to him of that date for said lot from the legal heirs of Benjamin Reynolds. It therefore became indispensable for plaintiff in error to show that O. J. Wilson at some time owned the said lot in question, otherwise, he never having owned the lot and never having any interest in it, there could be no fraud in his conveyance to his son Abram by mere quit claim deed.

It appears from the evidence that O. J. Wilson never had possession of the lot; the possession always having been in Abram. In order to show that O. J. Wilson ever had title in the said premises the plaintiffs in error offered what purported to be the record of a deed to said lot by Abram Wilson and wife to him, dated October 20, 1883. It appeared from an examination of the record that the deed purported to have been acknowledged before a notary public, and while a notary's seal was attached to the acknowledgment the name of the notary was not signed to it.

The reading of this record in evidence was objected to by Boozle for the reason that the acknowledgment was not signed. We are clearly of the opinion that the deed was not properly acknowledged, so as to make the record evidence of the execution of the deed. We are also of the opinion that there was no other competent evidence of the execution of the deed. Certain witnesses, Kelley, Munson, Bliss, Poole and Taylor, were introduced to show admissions of O. J. Wilson, made out of the presence of Boozle after he had acquired title to the lot from Abram, to the effect that O. J. Wilson had been the owner of the land at one time; also McDonald, to show that prior to the time that O. J. Wilson executed the deed to Abram, October, 1884, and after the supposed deed from Abram to O. J., the latter claimed to own the lot.

We hold that none of the above evidence was competent to prove the execution of the supposed deed from Abram to O. J. Wilson. Abram had had a complete chain of title to the lot without deriving title to it through O. J. Wilson, and after the deed from Abram to Boozle he also had a complete title to the lot without reference to the deed from O. J. Wilson to Abram, unless it should be shown that the supposed deed from Abram to O. J. Wilson had, in fact, been executed. The law did not require him to claim title through O. J. Wilson. He might rely on his chain of title without the latter's conveyance to Abram Wilson.

Defendant in error's (Boozle's) title was not dependent on showing that O. J. Wilson once had title as supposed by coun-

sel, but it was sought to prove that O. J. Wilson had once the legal title, as a starting point to attack the title of defendant in error, Boozle.

Such admissions are incompetent to show the execution of the deed either made after or before the deed from O. J. Wilson to Abram Wilson. Conveyances can not be proved by parol evidence and the execution of a deed can not be proved by the admissions of persons not first shown to have been in privity with the title under which the grantee claims.

Evidence of possession is competent to show title, but in this case O. J. Wilson never had possession of the lot. Even if admissions of the holder of the title to real estate may be competent evidence to impeach title when made by a person while the owner is in possession against his subsequent grantees under certain circumstances (a question we need not decide), yet this would be an exception to the general rule against hearsay evidence based on the ground that such admissions are made against the owner's interests and are *res gestæ*. But this ownership must in some way be shown by evidence other than the admissions. It would be just as competent to prove agency by the admissions of the supposed agent as to allow title to be shown by the declarations of the supposed grantee.

We are clearly of the opinion that the execution of the deed can not be proven by showing the state of the accounts between O. J. and Abram Wilson.

That throws no light on the subject. The plaintiffs in error can not invoke either the answer to the bill of O. J. Wilson or the default of Abram Wilson as admitting title against their co-respondent, Boozle. The latter not admitting, in his answer, title in O. J. Wilson at any time, the matter must be regarded conformably to the rules of pleading as though expressly denied.

Plaintiffs in error are put on their proof. The plaintiffs in error having failed to prove the allegations of the bill and to show the execution of the alleged deed from Abram to O. J. Wilson, the question of fraud on the part of O. J. in the execution of his quit claim deed to Abram becomes imma-

terial, there appearing to be a complete title in Boozle without such deed. It would be improper to set aside Boozle's title and subject the lot to sale for the payment of O. J. Wilson's debts. There only remains to determine whether the \$1,000 note given by O. J. Wilson to John T. Wilson was given for a *bona fide* debt. The evidence on this point is quite voluminous and we have examined it with care, but find nothing in it to convince us that the court below erred in holding that the note was given for a *bona fide* consideration. It would serve no good purpose to canvass the evidence in detail, and therefore we omit to do so. The allowance of the claim payable *pro rata* is also proper under the circumstances. We, upon the whole case, are satisfied with the decree of the court below.

The decree is therefore affirmed.

Decree affirmed.

JOHN H. EVANS

v.

THE PEOPLE.

Bastardy Proceedings—Appeal—Dismissal—Second Appeal—Evidence.

1. Courts take judicial notice of their own records.
2. A record of dismissal, unless it appears otherwise therein, is a bar to a second appeal.
3. In order to pass upon the merits of the action of a court on a motion, the grounds of the same and the collateral facts must appear in a bill of exceptions, unless the order of the court discloses the grounds upon which it acted.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

The facts in this case are, that at the October term, 1886, of

SECOND DISTRICT—DECEMBER TERM, 1887. 617

Evans v. The People.

the County Court of Warren County, the case was tried before a jury and a verdict rendered against appellant, the then defendant, upon which a judgment was rendered on the 9th day of November, 1886, and on that day he prayed an appeal to the Circuit Court, which was "by the court allowed on filing bond in the sum of \$800 in twenty days from this date, the said bond to be approved by this court." On the 18th day of November the bond was filed and on the 19th was presented to and approved by the county judge. On the 29th day of December, 1886, all the papers were filed in the Circuit Court, and on January 3, 1887, being the first day of the January term of the Circuit Court, a motion was made on the part of the people to dismiss the appeal, which was by the court allowed, and at the same time, on motion of appellant, leave was granted to withdraw his appeal bond by leaving a certified copy. On March 5, 1887, counsel for appellant made a motion in the Circuit Court for leave to withdraw the papers filed in the cause, which was allowed; and the papers were withdrawn, and were taken back to the County Court and re-filed therein on that day, March 5th. On March 7, 1887, the case was reinstated upon the docket of the County Court and an approval of the bond made by the court. The record of January 6th was an allowance of the motion of the people made January 3d to dismiss the appeal, and allowing motion of defendant below to withdraw appeal bond. The motion of March 5th was an independent motion by defendant to withdraw papers.

The papers were re-filed in the County Court, approval of the bond made, and were, on April 23, 1887, taken back and re-filed in the Circuit Court, where, at the May term, 1887, the appeal was again dismissed. The record as made out and certified by the circuit clerk, at the instance of appellant's attorney, did not contain the orders made in the case at the January term of the Circuit Court. It being claimed that inasmuch as those orders were not introduced in evidence and preserved in a bill of exceptions, they are not properly a part of the record in this case.

Mr. R. J. GRIER, for appellant.

The case still being in County Court on the matter of the approval of the appeal bond, the Circuit Court could not dismiss the appeal so as to preclude appellant from rightfully taking the case into the Circuit Court at the May term, after the proper approval of the appeal bond in the County Court. *Hook v. Richeson et al.*, 106 Ill. 392.

The appeal was not perfected until the bond had been approved by the County Court. Approval of the bond was necessary. *Miller v. Superior Machine Co.*, 79 Ill. 450.

The case was not out of the County Court and in the Circuit Court until the bond had been filed and approved. *Simmons et al. v. Alexander*, 5 Gilm. 260; *Branigan v. Rose et al.*, 3 Gil. 133.

The order of the County Court was that the bond should be approved by the court. The judge, then acting at chambers, in vacation, could not approve the bond. Statute, title Courts, Chap. 37; *McFarland v. McFarland*, 4 Ill. App. 157.

The court having adjourned the day the order granting the appeal was entered, there was no court which could approve the bond until the next term, to wit, the February term, 1887.

Messrs. KIRKPATRICK & ALEXANDER, for appellee.

An appeal can only be taken when given by statute, and the provisions of the statute granting appeals must be strictly complied with. *Kemper v. Town of Waverly*, 81 Ill. 279; *Murphy v. McDonald*, 3 Ill. App. 19; *Andrews v. Rumsey*, 75 Ill. 598; *Bowlesville Co. v. Pulling*, 89 Ill. 58; *Hileman v. Beale*, 115 Ill. 355; *Rozier v. Williams*, 92 Ill. 188.

The power of a court ceases at the end of the term. *Goncher v. Patterson*, 94 Ill. 525; *Cook v. Wood*, 24 Ill. 296; *Becker v. Sauter*, 89 Ill. 596; *Dunham v. Commissioners*, 87 Ill. 185; *Baragwanath v. Wilson*, 4 Ill. App. 82.

An appeal may be prayed at any time during the term. *McMillen v. Bethold*, 40 Ill. 34; *Balance v. Frisby*, 1 Scam. 595.

And can not be allowed after the term. *Marris v. Deshazo*, 4 Rand. (Va.) 460; *Bagley v. Hazard*, 4 Yerg. 487.

LACEY, J. The question presented by this record is whether

the first dismissal of the appeal from the County Court was a bar to the second appeal. Upon the decision of this question, if in the affirmative, depends the right of the appellant to maintain the case in court upon the second appeal, or the second time he filed his papers in the Circuit Court.

We think that the dismissal of the appeal might, at least, be a bar to the presentation of any other appeal in the same case. If the appeal had been dismissed simply because it had not been perfected in the proper manner by the bond and security being approved in open court, the dismissal of the appeal as first presented might not have been a bar to any further appeal. But if the appeal had been dismissed by agreement, or for other reasons than the not perfecting the appeal in the proper form, the dismissal would be a bar. There was no bill of exceptions presented on the dismissal of the appeal January 6, 1887, and we are unable to see upon what grounds it was dismissed. A general record of dismissal stands against the second presentation of the appeal and everything will be presumed in favor of its being a bar unless it otherwise appears from the record. The dismissal is general, as appears from the record, and we must presume that it was a final disposition of the entire appeal unless, by bill of exception preserved, it otherwise appears. The appeal at first presented in the Circuit Court was brought there by the appellant as being perfect. If the appellee had made no motion to dismiss and the case had gone to trial and been tried on its merits, can it be doubted that the proceedings would have been sustained and the proceedings upheld? Under such circumstances the informality in the approval of the appeal bond would have been regarded as waived by the appellee. It has been held by the Supreme Court uniformly that in order to pass upon the merits of the action of the court on a motion, the grounds of the motion and all the collateral facts must be preserved in a bill of exceptions. *Buettner v. Norton Mfg. Co.*, 90 Ill. 415; *Hyatt v. Brown*, 82 Ill. 28; *Thompson v. White*, 64 Ill. 314; *Horn v. Neu*, 63 Ill. 539; *Goddy v. McClure*, 59 Ill. 182; *Douglass v. Pratt*, 43 Ill. 146; *Daniels v. Shields*, 38 Ill. 198; *Lucas v. Farrington*, 21 Ill. 32; *Parson v. Evans*, 17 Ill. 238; *Snell v. Trustees, etc.*, 58 Ill. 290.

There is, so far as we can discover, but one exception to the rule, and that is in cases where the dismissing or other order of the court discloses the grounds upon which the court acted as shown by the following cases: *Offield v. Seller*, 15 Ill. App. 308; *Randolph v. Emerick*, 13 Ill. 344; *Blair v. Ray*, 103 Ill. 615; *Zimmerman v. Cowan*, 107 Ill. 637. In *Blair v. Ray et al.*, *supra*, the court say: "But the ground of the court's decision in dismissing the suit rested upon the reasons which defendants assigned for the motion to dismiss, and the matter which was submitted to the court in support of the motion, all of which the record fails to show. It is easy to conceive there might have been matter submitted to the court which would have justified the order of dismissal; there might have been a stipulation to dismiss." The plaintiff's objection to the motion does not rebut this. If there had been an agreement in the case at bar to dismiss the appeal of January 6, 1887, as a final disposition of the case, can it be doubted that an order of dismissal under such circumstances would have been a final disposition of the appeal? and this and other facts to uphold the general order of dismissal as final we are bound to suppose existed in the absence of a bill of exceptions. The written motion is no part of the record. The appellant should not have submitted to a general order of dismissal without a bill of exceptions showing the grounds on which it was based. He should have asked to withdraw the papers and to strike the case from the docket. And if the court had erroneously ruled against him he could have appealed. Two appeals in the same case will not lie, and courts will take notice of all the records in the case. It was not necessary to plead the first dismissal in bar. The court could and should take notice of its own record of dismissal previously made. It was not necessary that the first order of dismissal should have been preserved in a bill of exceptions. The record order of dismissal was before the court, which it was bound to take notice of. It is not necessary to pass on the other questions raised in the case.

Judgment is therefore affirmed.

Judgment affirmed.

Richardson v. Gregory.

LIONEL W. RICHARDSON

v.

WILLIAM H. GREGORY.

Partnership—Dissolution—Statute of Limitations.

1. A specific agreement is not necessary to terminate a partnership; words and acts implying such intention are sufficient.
2. The statute of limitations begins to run from the dissolution of a partnership as to an action to settle the partnership accounts.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Winnebago County; the Hon. O. H. HORTON, Judge, presiding.

MESSRS. MARSHALL & TAGGART, for appellant.

MR. WM. LATHROP, for appellee.

LACEY, J. This was a bill in equity filed by appellant against appellee July 10, 1885, seeking to settle a partnership account between the parties. It appears that the articles of co-partnership were entered into between them on the 23d day of June, 1870. By such articles the firm name was to be "Richardson & Gregory," and the object of the partnership was the manufacture and sale of diamond plows and vending and selling the right to others to sell the same, etc., to be constructed according to a patent that Richardson had applied for to the commissioner of patents of the United States, and which was not then issued but was expected to be. The co-partnership was to commence on June 23, 1870, and continue for the time said patent should run unless sooner dissolved by mutual consent.

Gregory was to furnish a sum of money not exceeding \$10,000 at ten per cent. interest per annum, as the necessities of the business should require. Each of the parties at all

times during the continuance of the partnership was to give his attendance and each do their best and use their utmost skill and power to forward the interests of the concern, and to share equally the expenses.

The gains were to be divided as follows: Richardson to have 9-16 and Gregory 7-16. Books and true accounts were to be kept. Settlements were to be made first days of June and November of each year. At the end, or other sooner determination of the partnership agreement, a full and final settlement was to be made between them and all the gains and assets divided between them.

It was further stipulated that the said Richardson should never in any way or manner deprive or permit said Gregory to be deprived of his full share of 7-16 of said patent, "but the same shall be at all times used to their mutual benefit and advantage during the continuance of said co-partnership."

In appellee's answer the statute of five years limitations was set up and insisted on as a bar; it being averred that the partnership had been mutually dissolved more than five years prior to the bringing of the suit, and that the partnership affairs had been fully adjusted between them more than five years before filing the bill.

The issue seems to be whether the partnership had been dissolved for the length of time claimed by appellee, it being contended on the part of the appellant that the partnership did not terminate by its own limitation until about the time the complainant's bill was filed; it is claimed by the appellant that there had been no final settlement for the reason that the firm "still owned the patent, the source of almost all their other assets."

The facts tending to show that there was a dissolution of the partnership are not much disputed so far as the main features are concerned. Appellant testifies that the partnership had not been dissolved and that there had been negotiations or transactions between them, concerning the dissolution. "No negotiations between us concerning division of interests or sale of interests by one to the other in the patent." But it appears that there was an attempted settle-

Richardson v. Gregory.

ment of all the partnership accounts which ended May 15, 1878, in which, as the appellant swears, they "divided whatever assets they found in the company, principally notes, a portion of which I took and a portion went to him." "I think I took the plows and plow press; he took the letter press. There was a lease of college land divided previously. I don't think of anything more. There was a purported balance struck; that was what we were attempting to do. If there had been no errors that would have been a settlement up to that time. I don't know whether there would have been anything more aside from that." The settlement was never completed.

The appellee swears that there was a full and final settlement. It appears from the testimony of both parties that after 1873 no manufacturing was done or selling further than to settle up what had been previously sold. Appellee went to buying grain in August or September, 1880; up to that time he was engaged in settling up the old partnership accounts with its customers. No license fee was received or plows made after the attempted settlement.

The appellee swears that "no co-partnership act has taken place since 1877, other than the settlement of some old partnership matters that existed prior to 1877." The patent at the time of settlement was not considered; as appellee swears, "it was considered to be of no account, virtually dead, superseded by others; for that reason no account was made of it in the settlement."

It appears plain that the business of the partnership ceased as far back as 1877 by mutual consent. Although there was no express agreement that the partnership should be dissolved, it appears perfectly plain that it was dissolved by tacit consent and acquiescence, long prior to the attempted settlement in May, 1878.

At that time the entire known assets were divided, and each one took what at the time was considered to be his share according to the partnership agreement. It is true that the appellant claims there were large errors in the figuring by which the basis of the division of assets were arrived at.

But certainly the business of the firm to all intents and purposes had been dissolved in accordance with the terms of the agreement "by mutual consent."

As regards the patent, it will be seen by reading the agreement that there was nothing in it to show that the patent itself was assets of the firm, unless the partnership extended its full length. The use and benefit of the patent was all that was contracted for, and that was only for the time the partnership lasted.

In case the partnership was sooner dissolved by mutual consent, the patent would naturally belong to appellant. It was not assigned to the firm or agreed to be.

As far as the question of the dissolution is concerned, it would not matter whether the patent was an asset or not. At the dissolution, if it belonged to the firm, its value could have been adjusted and settled the same as the other assets. A bill might have been maintained by either party to compel settlement any time since 1877, and beyond doubt since 1878, if mistakes in settlement had occurred.

The last of appellee's letters concerning settlement was June 15, 1880, more than five years before the commencement of this suit.

A partnership is dissolved when both parties refuse to go on with the business. It is as effectual to dissolve a partnership as though there was an express agreement to dissolve. Both parties may by statements and acts treat the partnership as ended. *Legare v. Peacock*, 109 Ill. 94.

A partnership closes when there is an end put to the business itself. *Bank of Montreal v. Page*, 98 Ill., 119; *Spurk v. Leonard*, 9 Ill. App. 174.

The statute of limitations begins to run from the termination of the partnership in actions of account or bills in chancery to settle partnerships. *Pierce v. McClellan*, 93 Ill. 245; *Quayle v. Guild*, 91 Ill. 378; *Askew v. Spring*, 111 Ill. 662; *Bonney v. Stoughton*, 18 Ill. App. 562.

The court below dismissed the bill and we think properly.

The statute of limitations of five years having run since the dissolution of the partnership, the bill could not be maintained. The decree of the court below is, therefore, affirmed.

Decree affirmed.

Ricker v. Larkin.

ERNEST H. RICKER
v.
CYRUS H. LARKIN ET AL.

Corporations—Record of Incorporation—Fraud—Injunction—Costs.

27	625
46	376
27	625
161	426

1. A corporation is not authorized to proceed to business until the certificate of complete organization and a copy of all papers filed with the Secretary of State have been duly recorded.

2. Where such papers have been fraudulently and surreptitiously recorded, contrary to the agreement of the incorporators, such record is of no effect.

3. An injunction lies to prevent one of the incorporators of a proposed corporation from doing business in its name before it is duly incorporated.

[Opinion filed May 28, 1889.]

IN ERROR to the Circuit Court of Kane County; the Hon.
ISAAC G. WILSON, Judge, presiding.

On Motion to Tax Costs.

The defendants in error move the court to tax the costs of the additional abstract made by them to the plaintiff in error.

The motion will be overruled.

After an examination of the abstract of the plaintiff in error, and a comparison of it with that filed by defendants in error, we are of the opinion that the abstract filed by the former is in substantial compliance with the rules of this court, though it may have failed in some unimportant particulars. We do not think the failure was sufficient to call for a new abstract.

Statement of Facts.

The defendants in error filed their bill of complaint against the plaintiff in error, praying to restrain him, his agents, attorneys, etc., from issuing catalogues purporting to be printed by the "Elgin Nurseries and Seed Co.," and from transacting any business under the name of the company. The bill charges

that the plaintiff in error, Ricker, had been engaged in the nursery business in Elgin for the six years past; that the parties hereto entered into the following agreement to form the said stock company, and marked "A," as follows:

Exhibit "A," memorandum of agreement between Ricker of the first part, and Larkin, of the second part, dated August 24, 1886.

Recites that the parties and Scofield are about to form a corporation, to be known as Elgin Nurseries and Seed Company, capital stock 500 shares at \$50 each, and that first party wants second party to become interested; the covenants are:

1st. First party will subscribe for 258 shares of stock, and pay company 50 per cent. of the par value by assigning and conveying his nursery stock, chattel property, etc., for which company is to pay him \$5,000 in cash, and credit him with 50 per cent. of his subscription to be paid on 258 shares of stock.

2d. Second party will subscribe for 240 shares of stock, and will pay into the company, within five days of its organization, 50 per cent. of the par value thereof.

3d. First party to act as business manager, unless company should appoint some one else; to devote his time, etc., and receive \$100 per month salary.

4th. Shall keep a true account, open to inspection of second party, and on demand of second party shall immediately pay over to company the money in his hands.

5th. For any service second party may render he shall be paid a reasonable compensation.

6th. For any money second party may advance to the company over 50 per cent., second party guarantees 8 per cent. interest on same, and the company shall promptly repay on demand.

7th. Neither party shall sell any of the capital stock without first giving the other the refusal.

8th. At the end of one year, second party to have option to receive \$6,900 for his stock, in cash, or retain same and share in profits, which first party guarantees to be not less than 15 per cent., and in case he elects to take the \$6,900 cash, the first party is to take the same and pay for it within thirty

days and indemnify second party from any liability by reason of his having been a stockholder; if second party retains stock, first party guarantees that company shall pay annual dividend of not less than 15 per cent. for the term of — years ensuing.

9th. To secure the prompt payment and faithful performance of this contract on part of first party, he will, within five days of the time of the complete organization of said company, assign and turn over to second party 250 shares of the capital stock of such company, which shall henceforth stand in the name of second party on the books of the company and be controlled by him. In event of failure on part of the first party to comply with the terms of this contract, second party shall have the right to sell any or all of the 250 shares of stock at public or private sale, without notice to first party, for the best price that he can obtain for cash. If at the end of the year second party shall elect to hold his stock, instead of selling it for \$6,900, he shall return to first party 200 shares and retain 50 shares.

The following are the main allegations of the bill upon which relief was granted, to wit:

Charges that before this time, and about August 6th, Ranstead had prepared the preliminary papers for the organization of a company to be called the "Elgin Nursery and Seed Company," which were signed by Ricker, Scofield and one Ezra Rue, as commissioners, Larkin being absent; that a license was at once issued to open books to take subscriptions to the capital stock, and that thereupon the capital stock was fully subscribed, as follows: Scofield two shares, Ricker 258 shares, Larkin 240 shares; that the commissioners called a meeting of subscribers to elect directors, at which meeting, held September 1st, all the said subscribers were elected directors; that the commissioners thereupon made their report, and a certificate that the corporation was duly organized was issued from the office of the Secretary of State, and received on or about September 3d. (A copy of certificate and papers relating to organization attached, marked "Exhibit B.")

Larkin charges that when he subscribed for the stock Ricker understood that he, Ricker, was to sign a contract and carry

out verbal agreements; that Ricker insisted upon having the company fully organized, so that the fall trade in the nursery business might be carried on in the name of the company; charges that Ricker got out some circulars, to be distributed with catalogues, announcing to patrons the formation of the new company, but that Larkin would not consent to their distribution until a contract and bond was signed by Ricker.

Charges that Ricker and the defendant had an informal meeting at Scofield's house September 8th, and that Larkin submitted a draft of by-laws of such company; among other things, that the treasurer and the manager, who was also to be secretary, should give bonds in the sum of \$20,000. Ricker objected to giving so large a bond; charges that Ricker at this time wanted a modification in the proposed contract between himself and Larkin. Instead of condition to take Larkin's stock at end of year for \$6,900, Ricker wanted option to take at that price before end of year, and would give Larkin a mortgage on 320 acres of land in Dakota, and give bond with approved surety. Larkin considered this, and on the 10th of September said he would agree to it, but that Ricker must execute a contract and furnish a bond at once or drop the whole matter; charges that Ricker said he would.

Scofield admits that he signed the call for a meeting of stockholders, dated September 13th, but states that he did it under the impression that Ricker and Larkin had arranged their difficulties; and also states that he did not know at the time that Ricker had caused the corporation papers to be recorded.

Larkin charges again that it was understood that Ranstead was to draw the papers, "who was to hold such papers and documents until the said contract was executed by both parties;" states on information and belief that Ranstead had sole charge of said papers; and charges that he, Larkin, fully understood that the papers were not to be filed for record until a contract was signed between himself and Ricker; states that in Larkin's absence Ricker went to Ranstead's office and asked to take the papers to examine them; that Ranstead gave Ricker the papers thinking he would return them, but that Ricker filed them for

Ricker v. Larkin.

record September 8th, without the knowledge or consent of either defendant and in violation of the said agreement or understanding.

Larkin admits that he received the notice for the meeting of stockholders September 23d, and attended the meeting, and there first learned that Ricker had filed the papers; that he, Larkin, protested, and said that he wouldn't go any further with the business unless Ricker would sign the contract with him and give a bond; that Ricker said he would not sign such contract or give such bond, and that if Larkin wouldn't unite with him to call a meeting to elect officers and adopt by-laws, he would apply to the courts; and that thereupon Ricker did file his petition for a *mandamus* to compel Larkin and Scofield to act, and that such proceedings are now pending in this Circuit Court.

Larkin states that he was afraid that Ricker would use the name of the corporation in his business, and made some inquiries in November, but was unable to find that Ricker was doing any business in the name of the corporation; states that the complainants have never recognized the corporation except as stated in the bill, and they did what they did under the belief that Ricker would sign the contract.

Complainants charge that on the 5th of January, 1887, they each received a letter from Ricker, stating that he had written up a catalogue for "The Elgin Nurseries and Seed Co." for the spring trade of 1887, and that if they wished to see it they could call; that Larkin went to Ricker a day or two afterward and protested against the publication of the circulars and catalogues; that on the 7th Scofield procured a copy which is filed as an exhibit with this bill; that said catalogue purports to be issued by "The Elgin Nurseries and Seed Co.;" represents the company as incorporated in 1886, with a capital stock of \$25,000; is a successor to E. H. Ricker & Co., and that, "during the year 1886, we have formed a corporation under the name of 'The Elgin Nurseries and Seed Co.,' with a capital stock of \$25,000. The directors are E. H. Ricker D. C. Scofield and C. H. Larkin.

"E. H. RICKER, Business Manager."

Charges that Ricker used envelopes with the name of the corporation printed in red ink as successors to the old company of E. H. Ricker & Co; states that the complainants believe that it is Ricker's intention to give a large number of such catalogues printed for general distribution, and that unless restrained he will send them out; have reason to believe that he intends to conduct his business in the name of the said company.

Charges that Ricker has never signed the contract or executed bond and refuses to do so; that the incorporation papers were fraudulently taken from Raunstead's office and wrongfully filed by Ricker as stated, with the intention of forcing complainants into the company, as they believe, without their consent.

Charged that the company has no existence in fact; that the subscriptions are not paid, has no tangible property, no business, no by-laws and officers, except as stated; charges that they aided in organization in order to help Ricker, and to secure Larkin for the money he was to advance, and that the action of Ricker in filing the papers is a gross fraud on the complainants.

Charges that the complainants are old residents of Kane County and men of means; that they believe Ricker to be a man of limited resources; that they are told that Ricker claims to have already paid out \$300 in behalf of the said company and incurred liabilities on behalf of the company to the amount of \$100; besides are afraid if Ricker should send out catalogues with their names as directors they might be charged as to third persons; that unless restrained he will incur obligations for which they may be charged.

Messrs. R. M. IRELAND and R. N. BOTSFORD, for plaintiff in error.

The effect of granting the injunction, whether the corporation is regularly organized or irregularly organized, whether the same is a valid corporation or invalid, is to wipe it out of existence. The bill shows that the defendants in error, who are two of the three directors, refuse to act, and deny the va-

Ricker v. Larkin.

lidity of the corporation, and, of course, the restraining of the third, Ricker, who alleges its validity would destroy the corporation as completely as if it were ousted of its franchise, or dissolved by a direct proceeding brought for the purpose and in a legitimate way. We think, therefore, that we are right in our position that the validity or integrity of a corporation is involved here. The defendants deny its validity, the plaintiff asserts it; the effect of a decision in favor of the defendants would be to destroy the corporation.

But, if this proposition is correct, the bill should be dismissed, for it is almost elementary that the validity of a corporation can not be attacked collaterally. *Baker v. Adm'r of Backus*, 32 Ill. 83; *Tarbell v. Page*, 24 Ill. 46; *McCarthy v. Lavische*, 89 Ill. 270.

Even then, if the defendants in error are right in their contention that this corporation was never legally organized and the plaintiff in error wrong in his contention that it is a valid corporation, a direct proceeding should be brought by them for the purpose of setting it aside; and, under a thin disguise of seeking to avoid a collateral or incidental injury, they should not be heard here in their attempt to destroy the corporate character of this company, or render the same nugatory, against the protest of a stockholder, and, also, without the franchise it should not be heard. *Baker v. Adm'r of Backus*, 32 Ill. 83; *Campbell v. Morgan*, 4 Ill. App. 100.

It is apparent that if the injunction should be granted, it would have the effect not only to destroy the corporation, but it would have the further effect to release the defendants from the payment of their subscriptions. The law is settled that this can not be done except by the unanimous consent of all the subscribers. *Binmore Corp. Manual*, Sec. 25; *Melvin v. Lamar Ins. Co.*, 80 Ill. 447.

The subscription to stock is a contract, not to be varied by extrinsic agreements. *Ridgefield, etc., R. P. Co. v. Brush*, 43 Conn. 86; *Corwith v. Culver*, 69 Ill. 503; *Thompson, Liability of Stockholders*, Sec. 121.

The defendants in error having assisted in the organization of the company, and subscribed to its stock, acted in their

capacities as stockholders in electing themselves directors, and having accepted the trust embodied in the position of directors, are estopped now to deny the validity of the corporation. *Stone v. Great Western Oil Co.*, 41 Ill. 92; *Binnmore's Corp. Manual*, Sec. 277; *McCarthy v. Lavasche*, 89 Ill. 270; *Rutz v. The Essler and Ropiegniet Mfg. Co.*, 3 Ill. App. 87; *Corwith v. Culver*, 69 Ill. 506; *Thompson on Liabilities of Stockholders*, Secs. 161, 162, 163.

Mr. J. W. RANSTEAD, for defendant in error.

Injunction is the proper remedy in this case. In publishing the proposed catalogue and using the stationery proposed by Ricker, the defendants in error would have been held out to the public as directors in this company, and, as to third persons, would have been liable, to the extent of their stock subscriptions at least, for any obligations incurred in the name and upon the credit of the company. If such holding out by Ricker was unauthorized by them and in his own wrong, then they were threatened with serious damage, and such publication and use of their names should be enjoined. *Ruth v. Webster*, 10 Beav. 561; 2 *Lindley on Partnership* (Ewell's Edition), 999, 1000; *High on Injunction*, Secs. 1091, 1339; 2 *Story Eq. Juris.*, Sec. 951.

The company was not fully organized and could not proceed to business until the final certificate of incorporation was recorded with the recorder of deeds of Kane County. *Revised Statutes*, Ch. 32, Sec. 4; *Bigelow v. Gregory et al.*, 73 Ill. 197, *Gent v. Manf. and Mer. Ins. Co.*, 107 Ill. 652; *Morawetz on Corporations* (2d Ed.) 30.

The filing of the certificate was unauthorized and does not bind the defendants in error.

The case is similar to that of a deed in escrow which is recorded contrary to the conditions of the deposit; such recording would not amount to a delivery of the deed. *Haddock v. Haddock*, 22 Ill. 388; *I. C. R. R. Co. v. McCullough*, 59 Ill. 166.

LACEY, J. The bill was demurred to by the plaintiff in

Ricker v. Larkin.

error, and upon hearing the court overruled the demurrer, and the plaintiff in error choosing to abide his bill, the court rendered a decree in favor of the defendants in error in accordance with the prayer of the bill. To reverse this decree this writ of error is sued out. It is insisted that the bill shows that the organization of the "Elgin Nurseries and Seed Co." had been completed; hence the relief prayed for was within the control of the corporation itself.

The main question arising in the case is, was the organization of the company completed? We are clearly of the opinion it was not. Sec. 4, Chap. 32, R. S., provides that, "the Secretary of State shall thereupon issue a certificate of complete organization of the corporation making thereof a copy of all papers filed in his office in and about the organization of the corporation and duly authenticated under his hand and seal of State, and the same shall be recorded in a book kept for that purpose in the office of the recorder of deeds in the county where the principal office of such company is located. Upon the recording of the said copy the corporation shall be duly organized and may proceed to business."

It would seem clear without reference to any judicial construction of the above section of the statute that the organization of the company could not be complete without the filing of the copy as required.

The grant "to proceed to business" is plainly made to depend on such recording. The prohibition to proceed to business need not be in express words. The corporation depends for its powers upon the provisions of the statute either express or implied, and none is granted without the record.

But the statute in question has received judicial construction, by both this court and the Supreme Court, both holding to the principle here announced. *Bigelow v. Gregory*, 73 Ill. 197; *Gent v. M. & M. Ins. Co.*, 107 Ill. 652; Same case reported in 13 Ill. App. 308; *Deversey v. Smith*, 103 Ill. 378. The case of *Cross v. Pinckneyville*, 17 Ill. 58, is explained in *Bigelow v. Gregory*, *supra*. It is true that the copy of the papers were actually filed in the recorder's office, but surreptitiously and fraudulently, by the plaintiff in error, and contrary

Vol. 27.]

Chamberlain v. Bain.

to the agreement of the incorporators and against the will and without the consent of the other proposed members of the proposed incorporation. It is true that the original agreement to incorporate did not require plaintiff in error to give bond, but by mutual agreement a change was made in the agreement in which concessions were mutually made and by which the plaintiff in error agreed to give a bond with security before the completion of the organization. This was binding and should have been complied with. The bill shows a clear case of fraudulent intent on the part of the plaintiff in error to obtain the benefits of the organization without complying with his part of the agreement. The procurement of the recording of the papers fraudulently had no more effect to make a legal record than though the papers had never been recorded. *Haddock v. Haddock*, 22 Ill. 385; *I. C. R. R. Co. v. McCullough*, 59 Ill. 166. According to the allegations of the bill the defendants in error never ratified the act of recording of the copy of the incorporation papers by plaintiff in error. Holding, as we do, that the bill shows that the proposed organization was never completed, it will be unnecessary to notice the argument of plaintiff in error's counsel based on the supposition that there was a complete organization. Finding no error in the record the decree of the Circuit Court is affirmed.

Decree affirmed.

PORTER E. CHAMBERLAIN

v.

JOHN BAIN.

Sales—Auction—Rescission—Instructions—Improper Question.

- * In an action to recover the purchase price of cattle bid off by the plaintiff at an auction sale, an alleged rescission of the sale being the issue, it is improper so to instruct the jury as to throw on the plaintiff

Chamberlain v. Bain.

the burden of showing that he still keeps the cattle ready for delivery to the defendant.

2. An auction sale is not executory, but is completed when the property is knocked down to the purchaser.

3. A question calling for the conclusion of the witness is improper.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Winnebago County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. B. A. KNIGHT, for appellant.

Mr. J. C. GARVER, for appellee.

LACEY, J. The appellant brought suit against the appellee in an action of assumpsit to recover the purchase price of twenty-four steers bid off by appellee at the former's auction sale for the sum of something over \$25 per head. The cause was tried by a jury and resulted in a judgment in favor of appellee. It is claimed by appellant that the cattle were knocked off to appellee by the auctioneer to be paid for in one year at six per cent. interest, the appellee giving his note with approved security for the amount.

It is claimed by the appellee that by agreement at the sale he was only to give his own note without security. The time of credit given by the terms of the sale had expired before the suit was commenced. The note not having been given or the money paid for the cattle, the suit was instituted to recover their purchase price. The following Saturday after the sale appellee went to appellant's premises after the cattle, but had no signer for the note, and the appellant refused to let him have the cattle without security on the note, which he refused to give, and did not give it, or his individual note. On the following Monday appellant went to appellee's house and offered to let him have the cattle on his own note, but the latter refused to give the note on the grounds that the appellant had refused to take his note at first. There is some evidence tending to show that appellant refused to let appellee have

the cattle because they had risen in price, when called for, and the want of security was not the reason. The evidence also tends to show that the parties by mutual consent rescinded the sale soon after it was made, the appellant saying, "If you don't want the cattle I will dispose of them, as I can not handle them," the appellee replying, "All right, sir, you can;" again, appellee saying, "I have bought more cattle and I don't want them," the appellant replying, "Well, then I will dispose of them to somebody else." It is claimed that appellant can not recover under his declaration for cattle sold, as he had rescinded the sale and sold the cattle.

The evidence fails to show whether the appellant still had the cattle at the time the suit was commenced or not.

The appellant assigns for error the modification of the court of the instructions Nos. 3 and 5, as follows:

No. 3. "If the jury finds from the evidence that the bargain for the sale of the cattle in controversy was complete, and that a term of credit was to be given by the terms of the sale and that such terms of credit had expired, then the court instructs the jury that the plaintiff has the right to sue for the price agreed to be paid for such cattle at such sale without a delivery or offer to deliver such cattle."

No. 5. "The court further instructs the jury that if they believe from the evidence that John Bain purchased from Porter E. Chamberlain, the plaintiff, at public sale, the cattle in controversy in this suit, and by the terms of the said sale a credit of one year's time with approved security was to be given, and the said Bain has not given his note with approved security for the price agreed to be paid for the cattle, or otherwise satisfied the price agreed to be paid for them, and that such term of credit has expired, that then said Chamberlain has a right to recover in this suit of said Bain the price agreed to be paid for said cattle." The court refused to give the instructions as asked, but modified each of them by adding the words to each, "This is so if you believe from the evidence that the plaintiff kept the cattle for the defendant, and still holds them ready to be delivered to the defendant," and gave them as modified.

The instructions were erroneous as asked, as being injurious to the appellee, in that they wholly ignored the issue presented to the jury, whether or not there had been a rescission of the contract of sale by mutual consent. If that had been done there would have been no right of recovery, but as modified the instructions instead of aiding the appellant were turned into a weapon against him. There was no evidence tending to show that the appellant still kept the cattle for the appellee, ready to deliver them or otherwise.

The evidence was silent on that subject, and the effect was to throw the burden of proof on the appellant to show that fact.

We think the court misapprehended the nature of the transaction. This was not an executory sale of cattle where the vendor agrees to sell and the vendee to purchase and pay for one delivery, but an executed contract, completed when the cattle were knocked down to appellee, with nothing to do on his part but to give the note and take the cattle. According to the well established rules of the law the cattle were simply held by the vendor as bailee at the vendee's request. Under the circumstances it was appellee's duty to show that the cattle had been disposed of by appellant if such was the case and the value of them if he desired recoupment.

This rule of law is well recognized in *Wade v. Moffitt*, 21 Ill. 110. Instructions Nos. 1, 2 and 3, offered by appellant and refused by the court, were properly refused as having a tendency to mislead.

The form of the question propounded to appellee, as follows, "Were you ready and willing to perform your part of the contract at that time?" was erroneous. It called for a conclusion and was immaterial. It mattered not what he was ready and willing to do if he did not do it, or offer to perform. It involved a construction of what he understood the contract to be. The witness should have been confined to a statement of the facts. We will not notice any other assignment of error. For the foregoing errors noted the judgment is reversed and the cause remanded.

Reversed and remanded.

JOSEPH CORCORAN

V.

THE PEOPLE, ETC.

Bastardy—Evidence.

1. In bastardy proceedings evidence tending to prove the poverty of the mother, or that she has named the child after the reputed father, is inadmissible.

2. Under the circumstances of the case presented, this court approves the action of the trial court in permitting certain young men to testify that they had never had sexual intercourse with the prosecuting witness.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court, La Salle County; the Hon. GEORGE W. STIPP, Judge, presiding.

MESSRS. DUNCAN, O'CONOR & GILBERT and BULL, STRAWN & RUGER, for appellant.

MESSRS. MOLONEY & STEAD, for appellee.

LACEY, J. The appellant was charged with being the father of the illegitimate child of Bridget Cashman, who was an unmarried woman. The truth of the charge rested upon the unsupported testimony of the mother of the child, who testified to but one act of illicit intercourse between her and the appellant, which she claims took place at a picnic on William Butler's premises on the evening of the 24th of August, 1884, and that the child was born May 17, 1885. According to her testimony no other act of illicit intercourse ever took place with him either before or after that time, though he had attempted it once before but never afterward. The appellant unqualifiedly denies in his testimony that he ever had any act of illicit intercourse with her in his life. There is no evidence that corroborates her, but some that seems to throw discredit

Corcoran v. The People.

on her statements. To say the least, the evidence is weak and of an unsatisfactory character to establish the paternity of the child on the appellant. We are not entirely prepared to say, however, if there had been no error committed by the court in the conduct of the trial, that we would set aside the verdict for the want of evidence to support it. Various errors are assigned as to the ruling of the court in the admission of evidence. Among other things the court allowed appellee, against appellant's objection, to show that the complaining witness had named her child, which was a boy, Joseph Corcoran, after the reputed father, and had had him baptized in the Catholic church by that name; also that she was too poor to buy clothes for the child before it was born. We think this was error on the part of the court. The evidence certainly did not tend to establish any issue in the case. It was in the nature of manufactured evidence to allow the complaining witness to corroborate her own oath by her own acts, which are in the nature of declarations that appellant was the father of her illegitimate child. The question of the poverty of the prosecuting witness had no bearing on the issue in the case. It was improper to go to the jury. It was immaterial, and could only have a detrimental influence against appellant by creating a strong feeling of sympathy in the minds of the jury in favor of the prosecuting witness. Such evidence has been condemned by the Supreme Court in various cases, in principle the same as this. *Chicago v. O'Brennan*, 65 Ill. 160.

The other objections to rulings of the court complained of by counsel for appellant, we do not think well taken. The instructions given for appellee, in regard to the quantum of evidence sufficient to establish appellant's paternity of the child, we think are not erroneous. The evidence of certain young men, members of the family with which Bridget Cashman lived, to the effect that they had never had sexual intercourse with her, was not, as we think, improper under the circumstances, provided appellee desired to show such facts. It might be considered by the jury for what it was worth. But for the errors above indicated the judgment of the court is reversed and the cause remanded.

Reversed and remanded.

CHARLES GURNEY

V.

JAMES BROWN.

Promissory Note—Liability of Joint Maker—Disputed Signature—Hearsay Evidence—Instructions.

To admit evidence upon the ground that it is desired to prove a certain immaterial fact, when the result will be to produce hearsay evidence, not within any of the exceptions to the rule prohibiting the introduction of such evidence, is reversible error.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. BULL, STRAWN & RUGER and MAYO & WIDMER, for appellant.

Mr. WALTER REEVES, for appellee.

LACEY, J. This suit was brought on a promissory note of \$320, given by Fred. Gurney to appellee through the agency of one Dicus, and the appellant is charged as a joint maker of the note as security. Fred. Gurney, prior to the commencement of the suit, had absconded and left the State. The appellant filed his plea under oath, denying the execution of the note. The only proof of the genuineness of the signature of the appellant was the testimony of the appellee himself, who did not see appellant sign the note, but swears to certain circumstances, which it is claimed are sufficient to raise the presumption that his signature was genuine. Before the money was loaned by appellee to Fred. Gurney, Dicus had the note made out and placed in the hands of the principal to procure the signature of appellant. After a time, Fred. Gurney brought the note back with his own signature and the name of

Gurney v. Brown.

appellee upon it. The money was then loaned on the note by appellee to Fred. Gurney. On the trial the appellee, Brown, testified that in two or three days, not to exceed a week after loaning the money, he saw appellant across the street in Streator, and went over to him and said to him that he had loaned Fred. Gurney, through Squire Dieus, \$320, with the promise of Charles Gurney as security, and that Squire Dieus didn't see him sign the note, and he, appellant, wanted to know whether he signed it or not, and the appellee answered and said he did sign it. The appellee, on the contrary, testified that in the fall of 1885, the appellee stepped up to him and asked him if he did not sign a note for Fred. Gurney, and he said he did, and passed on; that the reason he made this reply was that he signed a note for Fred. which was then outstanding, and he thought that was the one referred to by appellee. He further stated that appellee did not show him any note. At another conversation with appellee in reference to signing the note appellant claimed that he denied it; this was also in 1885, after the first conversation. Appellee denied any conversation of like nature in 1883. It was very important to appellee to show that such conversation as he testifies to, or a similar one, occurred in 1883, in order to corroborate his own and to impeach appellant's testimony. To establish this fact Dieus was called and this question was propounded to him by counsel for appellee: "Did Mr. Fred. Gurney speak on the subject (of the conversation)? I don't ask you to state, but did he speak to you on the subject of Charles Gurney coming to him and talking upon the question of Brown, the plaintiff, approaching him, Charles Gurney, concerning this note?" This question was objected to and the objection sustained by the court. Thereupon Mr. Reeves, attorney for appellant, stated to the court: "I don't seek to show the contents of the conversation, but I want to fix a date; it is a question of date; I desire to ask when it was, with reference to the date of the note, if Mr. Gurney did so speak to you, that is, if Fred. Gurney did so speak to you, when was it with reference to the date of the note?" Thereupon the court overruled the objection and instructed the witness that

VOL. 27.]

Gurney v. Brown.

he might answer the question as to whether or not Fred. Gurney spoke to him upon the subject alluded to by the counsel in the question. Mr. Reeves then repeated, "upon the subject of Charles Gurney coming to him and talking about Brown's coming to him, Charles Gurney." The objection was again overruled and exception taken. The witness answered. "He did." Upon being asked when it was, the witness further stated that it "occurred a short time after this note was executed and delivered to Brown, I should say; I should place it within two months of the time, and my version is, a shorter time; might have been two months," etc. In this the court erred.

It is apparent that this evidence must have been very damaging to appellant. It is evident that it would have been of no benefit to appellee, to show that at that date Dicus had a conversation with Fred. Gurney in regard to some unknown subject, but it was very important to show that the subject of that conversation was the acknowledgment by appellant to Fred. Gurney, at that date, that appellee had approached him on the subject of his signature to the note in question. That was all the value there was in the question and answer. The jury was invited by this testimony to infer that a conversation took place in 1883, soon after the execution of the note in which the appellee had demanded to know whether appellant had signed the note. This could only be inferred by reason of statements of Fred. Gurney to the witness Dicus. This was the purpose of the question and answer, however much it might be concealed by the claim that its purpose was simply to fix a date; for a date was of no consequence outside the subject-matter of the conversation. To prove the statements of Fred. Gurney, either express or implied, that appellant had told him in 1883 that appellee had approached him in regard to his signature to the note, would be to introduce hearsay, and violative of one of the primary rules concerning the production of evidence. Nor does this come within any of the exceptions to the rule prohibiting the introduction of such evidence. *Weyrich v. The People*, 89 Ill. 90.

We see no error in the refusal of the court to give appel-

Chaplin v. Highway Commissioners.

lant's instructions Nos. 3 and 4, offered. The principle announced in No. 3, was covered by instruction No. 2, given for appellant. The instruction No. 4, concerning the oral admissions of appellant, was properly refused. It is in substance the same as the one on the same subject condemned by this court in *Byrne v. Hartshorn*, 21 Ill. App. 650. We see no other error. The court erred in allowing the evidence of Dicus above mentioned. For this error the judgment is reversed and the cause remanded.

Reversed and remanded.

JAMES CHAPLIN

v.

HIGHWAY COMMISSIONERS OF THE TOWNSHIP OF
WHEATLAND.

*Highways—Drains—Proceedings under Sec. 8, Chap. 121, R. S.—
Various Objections—Parties—Validity of Statute—Waiver of Objection—
Prescription.*

1. In proceedings under Sec. 8, Chap. 121, R. S., it is not necessary to seek the consent of the owner of land through which the proposed ditch is to be cut where he has shown himself by his acts to be opposed to the same.

2. The adjudication of the justice and jury as to the necessity of the drain and the damage done is final.

3. The statute allows proceedings to be instituted and carried on for the purpose of carrying off the water from a highway without reference to whether there is a slough or pond therein.

4. Where the center of a road is coincident with a town line, and one town has charge of the same by allotment, it may maintain proceedings under the statute in the names of both towns, at least until objection is made by the commissioners of the other town, a private party having no right to object.

5. In the case presented the evidence does not show that the proceedings were solely for the benefit of third persons.

6. An objection to the validity of a statute is waived by an appeal to this court.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Will County.

Messrs. E. MEERS and D. GILMORE, for appellant.

The commissioners of Wheatland had no authority to take any steps toward the digging, cleaning or opening of the ditch on or across the land of Chaplin unless acting in conjunction with the commissioners of the town of Plainfield at a regular called meeting of both boards for such purpose and first determined, on by a majority of each separate board of commissioners, and then by a majority of the members of both boards acting as one body. The Comrs. of Highways of the Town of Deer Park v. The Wrought Iron Bridge Co., 3 Ill. App. 570; Sec. 26, Road and Bridge Act; Clause 4, Sec. 40, Township Organization Act; McManus v. McDonald, 107 Ill. 95; Mack v. Tracy et al., 41 Ill. 377.

Highway commissioners can not grant the right to private parties to ditch on highways, nor bind the public to furnish drainage for the land of private individuals. Johnson v. Rea, 12 Ill. App. 331.

The water must be discharged into a natural watercourse or channel. Peck v. Herrington, 109 Ill. 611; Wagner v. Chaney, 19 Ill. App. 546.

There was no pond or slough on the highway at the point where the commissioners proposed to drain, consequently there was no necessity for a ditch being dug by the said commissioners on the land of Chaplin. The People ex rel. v. Board of Supervisors of Vermillion County, 47 Ill. 256.

Messrs. A. F. MATHER and A. O. MARSHALL, for appellee.

LACEY, J. This was a bill in equity for injunction to restrain the appellees from opening a drain on his lands which they were threatening to do. It shows that appellant was the owner of an eighty acre tract of land in the town of Plainfield in Will county, the long way of it being east and west; that there was a public highway on the north line of it; that one Davis owned the eighty-acre tract lying north of his and adjoining

it on its north line, and that one Schaffer owned an eighty-acre tract adjoining and immediately north of Davis' tract; that the two latter tracts were in the town of Wheatland in said county; that the road, which is four rods wide, was one-half on appellant's and one-half on Davis' tract. The bill alleges that Schaffer and Davis had extended a tile drain through their land to the highway about forty-four rods west of his northeast corner, and had extended it through the highway to his line; that they had opened a ditch through his land to let their water flow off from the tile drain they had laid, which discharged water in great quantities and overflowed his land, and that he had filled up such drain with brush, etc., making a so-called dam under and near his fence adjoining the highway which had not been since disturbed. Avers that Schaffer and Davis had no right to drain their water across his land, but should, if they drain the same to said highway, continue the drain east along the north side of the highway to an outlet; that he was willing to have the extra water taken across his land if the same was done according to the provisions of the "Drainage Act" of this State, and pay his portion of the expense of constructing a tile drain, and that he had so notified Davis and Schaffer. The bill further charges that on the 20th of June, 1885, the highway commissioners of Wheatland commenced proceedings before A. B. Cotton, as justice of the peace of said township, for the alleged purpose of having the damages assessed, which he might sustain by reason of digging, opening and cleaning a ditch or drain by the commissioners of highways of the town of Wheatland on or across the north half of the northeast quarter of said Sec. 4 (being the land of appellant), to commence at a point upon the east and west highway—upon the town line between the towns of Wheatland and Plainfield at or about forty-four rods and fifteen links west from the north corner of said Sec. 4, running thence south of southeast nine rods and fifteen links; thence gradually to the south of the southwest nineteen rods, and for greater certainty described as follows: "And be upon the same ground occupied by the ditch or drain now upon said land—said ditch or drain to be twenty-eight and two-fifths

rods in length, three feet wide and eighteen inches deep from surface of land. The suit was brought in the name of the highway commissioners of the two towns for the use of the town of Wheatland. (It appears that the portion of the highway had been allotted under the statute to the latter named town and it had complete control over it.) It was further shown that the cause was tried before the justice and a jury of twelve men, and resulted, after having been defended by appellant, in the jury granting the right to dig the ditch and awarding to appellant \$12 damages. Quite a number of objections are taken by appellant to the proceedings to condemn the said right of way, to wit: (1) No attempt was made by the towns to obtain the consent of appellant to the opening of the drain, and no such attempt was shown at the trial. (2) There was no necessity for the drain, because there was no pond or slough on the highway at the point where the drain stands. (3) That said proceedings were commenced and judgment obtained through fraud and misrepresentation of the commissioners. (4) The commissioners of Wheatland did not obtain the consent of the commissioners of Plainfield to commence proceedings. (5) There was no pond of water in the limits of the town of Wheatland at the point to be drained. (6) The town of Wheatland had no power under the statute to enter the lands in the adjoining town of Plainfield. (7) No ditch by prescription or grant prior to spring of 1884. (8) The proceedings before the justice and the proposed drain are solely for the benefit of Davis and Schaffer and not for public benefit. (9) The place of commencement is not accurately described in the summons, neither is the termination, and the said terminal point is nine feet and two inches east of the alleged ditch or drain now open upon said land as stated in the summons. (10) The ditch if dug would be of great injury to appellant's land, for which the jury did not award damages. (11) The statute under which the proceedings are instituted is unconstitutional. The bill avers that all the above points before the justice of the peace were ignored and disregarded by the justice and jury although most strenuously contended for by the counsel for appellant; that the appellant

took an appeal to the Circuit Court which was dismissed on motion of plaintiff's attorney or petitioner. The bill was answered, and upon trial on bill, answer, replication and proofs, the court found the equities in favor of appellees, and dissolved the injunction and dismissed the bill at complainant's costs, from which decree this appeal is taken, and this court asked to reverse the same. The condemnation proceedings were had under Sec. 8, Chap. 121, R. S., or the act entitled, "Roads, Highways and Bridges," act of 1883, page 136, Sec. 8, Session Laws. The section reads as follows: "The commissioners of highways of the several towns are hereby authorized to enter upon any land adjacent to any highway in their town for the purpose of opening any ditch, drain, necessary sluice or watercourse, whenever it shall be necessary to open a watercourse from any highway to any watercourses, and to dig open and clean ditches upon said land for the purpose of carrying off the water from said highways or to drain any sloughs or pond on said highway: *Provided*, that unless the owner of such land, or his agent, shall first consent to the cutting of such ditches, the commissioners shall apply to any justice of the peace in the county in which such road is situated, for a summons directed to any constable of said county, etc., * * * for the purpose of having the damages assessed which such owner may sustain by reason of the digging or opening such ditches or drains. * * * On the return of such summons, *venire* shall be issued for a jury of twelve persons who shall be summoned and whose competency shall be determined as in other cases in the trial of civil actions before justices of the peace; which jury shall assess such damages and render a verdict therefor which shall be final and conclusive of the amount of damages sustained by such persons, and the amount so awarded shall be paid before the commissioners of highways shall be warranted and empowered to enter such lands and dig, open and clean such drains, ditches, and watercourses, as aforesaid, for the purpose contemplated in this act; and the commissioners of highways are further authorized to use and employ the road and bridge money of their town for such purpose, etc.

From the proceedings carried to a final conclusion before a justice, there is no appeal. The decision of the justice and jury is final, provided that the justice obtains jurisdiction of the person of the owner of the land, and the subject-matter of the right of way to be condemned. The legislature taking into account the great necessity there was to the public to have the highways of the State made dry and passable, determined by the passage of this statute to make the proceedings to obtain an outlet to drain water from roads summary, and the decision before the justice final. The proceeding in this instance is drawn into question collaterally—hence every intendment must be in favor of the validity of the condemnation of the right of way for the ditch. The burden of proof is on the appellant to show that the justice had no jurisdiction. The appellant has failed to make out any valid objection to the validity of the condemnation proceedings before the justice raised in his 1st, 2d and 3d points. The evidence clearly shows that the appellant would not give his consent to have the drain opened when applied to by one of the commissioners, and besides that he has resisted the opening of the drain at every step of the proceeding, and is still resisting on every ground he can raise. It appears any formal request on the part of the commissioners as an official body, to appellant, to allow the opening of the drain, would have been useless. We think there was necessity for the drain after the appellant had filled up the old ditch, and that whether the tile named had been put in by Schaffer and Davis or not. Besides, we think the adjudication of the justice and jury on that point was final. We see no evidence sufficient to show that the proceedings were instituted and carried on fraudulently, though that point is not insisted on in appellant's brief. Equally groundless are the points raised by appellant in Nos. 4, 5 and 6. As to No. 5, the statute allows the proceedings to be instituted and carried on for the purpose of carrying off the water from the highway, whether there is a slough or pond in the highway or not.

The suit was commenced and carried on in the name of the commissioners of highways of the towns of Wheatland and

Plainfield, and the consent of Plainfield under the circumstances will be presumed. This particular road being on the town line, was under the jurisdiction of the commissioners of Wheatland by allotment, and presumably the commissioners of Plainfield gave their consent to the use of its name to the other commissioners, to carry on such proceedings in its name necessary to properly improve the road, which the commissioners of highways of Wheatland had undertaken to do by request of the commissioners of the other town and by agreement, and as the point is only technical at best, the appellant can not object if the commissioners of highways of Plainfield do not. Again, under a proper and fair construction of the statute, we are of the opinion that the Wheatland commissioners might carry on the proceedings in their own name. The highway was on the town line, and the commissioners of highways of Wheatland had control of this road by allotment under the statute, and we think it no more than a fair construction of the statute to regard the highway as being "in their town," for the purpose of the condemnation proceedings. It was a portion of the road over which the commissioners of Wheatland had jurisdiction; and if the center of the road was coincident with the town line, which we suppose it was, at least half of the highway was actually and physically in Wheatland town.

Points 7, 8 and 9 are not well taken. It is not necessary, as contended in point 7, that there should be any ditch by prescription if the condemnation proceedings were regular, which, as hereafter will be seen, they were. As to 8, we can not hold that the appellant has shown that the condemnation proceedings were solely for the benefit of Davis and Schaffer. We think that the evidence shows that the highway needed some kind of a ditch at the point where the condemnation was made, though probably the ditch that had existed for some time on appellant's land, at or near the route of the one condemned, would have been sufficient but for its having been closed up by the latter. And the ditch not being permanently established by prescription gave appellant the right to fill it up and compelled the appellees to open it by legal proceed-

ings. The opening of the ditch was for the public benefit. The place of commencement and termination are set out with sufficient accuracy in the summons issued by the justice. The point of commencement is to all intents accurate, but it is claimed that the termination is lacking nine feet and two inches of meeting an outlet called the "old washout"—hence the argument is, the proposed drain does not connect with "a natural watercourse" as the statute requires. If the contemplated drain connected with the "washout," then it is conceded the proceedings would comply with the statute in that respect. We think that the evidence shows that the proposed drain sufficiently connects with the old "washout," so called, or with a drain only a few feet from it, which would render the drain sufficient in its connections. The surveyor who ran the line for the new ditch, shows by his profile that it connects, and such was the intention, and we think the appellant has failed to show that it does not connect.

In the 10th and 11th objections the appellant claims that the digging of the proposed drain would greatly damage the appellant's land, for which the jury did not award damages, and that the act of the legislature allowing the condemnation of such right of way for such drains is unconstitutional, and the statute void.

In answer to the first of the last named objections we need only say that the statute makes the verdict of the jury as to such damages "final and conclusive of the amount of damages sustained by such person," etc. The jury in this case gave the appellant \$12 damages which the commissioners were ready to pay.

As to the constitutional point we only have to say that the appellant, by bringing his case to this court, waived that point. We have no power under the statute to pass upon it. If the appellant had desired to have that point passed upon he should have taken his appeal to the Supreme Court. Not having done so and not having made any motion here to dismiss his appeal for want of jurisdiction in this court, we must regard that point as waived by him. The statute provides that appeals and writs of error shall lie from the final orders,

Gould v. Warne.

judgments and decrees of the Circuit and City Courts, and from the Superior Court of Cook County directly to the Supreme Court in all criminal cases and in cases involving a franchise or freehold, or the validity of a statute" and by the terms of the same section withholds the right of appeal to the Appellate Court in cases involving the "validity of a statute." See "Appellate Courts," Session Laws, 1887, Sec. 8, page 156. The validity of Sec. 8 of the above road and bridge law is what appellant questions in his argument here on account of unconstitutionality. As above said we regard the point as waived by the appeal in this court.

The decree of the court below is therefore affirmed.

Decree affirmed.

C. W. GOULD ET AL.

V.

JOHN WARNE ET AL.

Action on Bond—Sales—Excessive Judgment.

1. What will, or will not, amount to a sale, is a matter of fact to be determined from the evidence, and depends upon the intention of the parties to the transaction.

2. In an action on a bond to secure the patrons of a cheese factory, it is *held*: That the bondsmen are only liable on account of dividends and not in cases, if any, where direct sales of the milk were made; and that the judgment is erroneous because for a larger sum than is justified by the breaches assigned in the declaration.

[Opinion filed May 28, 1888.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. BOTSFORD & WAYNE and SHERWOOD & JONES, for appellants.

A surety can not be bound beyond the express and literal

condition of his undertaking. He has a right to stand upon the very terms of his contract. *Miller v. Stewart*, 9 Wheat. 680; *Field v. Rawlings*, 1 Gilm. 581.

Any agreement between the principal and his creditors, by which the terms of a bond are changed without the assent of the sureties, releases the sureties from liability. *Cunningham v. Wrenn*, 23 Ill. 64; *Burt v. McFadden*, 58 Ill. 479; *Dodgett v. Henderson*, 113 Ill. 360.

The measure of the liability of sureties is fixed by the terms of the instrument they sign, and such undertaking can not be enlarged or varied by judicial construction. Their undertaking will be construed as the words used are ordinarily understood. *Mix v. Singleton*, 86 Ill. 194; *Phillip v. Singer Mfg. Co.*, 88 Ill. 305; *People v. Tompkins*, 74 Ill. 482; *Burgett v. Paxton*, 15 Ill. App. 380.

A surety is not held beyond the precise words of his undertaking, and in case of doubt as to his liability, the doubt is generally, if not necessarily, solved in his favor. *Stull v. Hance*, 62 Ill. 52; *Adams v. People*, 12 Ill. App. 380.

MESSRS. CHARLES WHEATON and W. R. S. HUNTER, for appellee.

A parol agreement to vary a contract under seal will not discharge the surety on a sealed instrument. *Chapman v. McGrew*, 20 Ill. page 101; *Chidester et al. v. S. & I. S. E. R. W. Co.*, 59 Ill. 87.

An obligation by an instrument under seal can not be discharged by parol. *Davy v. Prendergast*, 5 B. & A. 187; *Bul-teel v. Jarrod*, 8 Price, 467; *Trent Navigation Co. v. Harley*, 10 East, 34.

Where two or more persons enter into a contract of a continuing nature, one of them can not, by his own act, discharge himself from liability and put an end to the contract, without the consent of the other, unless there is an express power of defeasance reserved to him. 1 Addison on Cont., Sec. 361.

LACEY, J. This was a suit on a voluntary bond given by the appellants Gould & Hugg as principals, and by the other

appellants, D. F. and D. H. Barclay, as sureties, to appellee, as trustees of the patrons of the Blackberry Cheese Factory. The bond is in the penal sum of \$3,000, conditioned "that if the above bounden Gould & Hugg, their heirs, etc., shall well and truly pay or cause to be paid unto the said patrons of the Blackberry Cheese Factory, or their heirs, etc., the just and full sums of the monthly dividends declared by the said Gould & Hugg to their Blackberry patrons for milk delivered thereat, and shown by their books to be said patrons' due, then this obligation to be void and of no effect." Dated April 24, 1882. The suit was brought for the use of some twenty-eight of the patrons of the factory named in the declaration as usees. The declaration shows that the factory was continued to be operated by Gould & Hugg till March 20, 1885, and that "the said usees" were patrons of the said factory and delivered to it milk during the months of January, February and March, 1885, in large quantities, etc., and that said Gould & Hugg declared them dividends thereon, to wit, (setting out the several amounts claimed to be due to the said usees,) which had not been paid. The defense set up was that as to the usees the factory was not conducted on the dividend plan, which was that the butter was to be made from the milk and sold by Gould & Hugg, after deducting a price, four cents per pound, for butter, for manufacturing and selling; the balance was divided among the several patrons *pro rata* according to the quantity of the milk furnished by each. That the amount found to be due each patron was called a dividend, which was paid monthly by said Gould & Hugg; that the said usees for the three months above named entered into a different arrangement with Gould & Hugg in regard to the compensation for their milk, and contracted with them for an absolute sale of their milk to them for a certain sum to be paid by them irrespective of what their milk would actually produce and that the amounts claimed in the declaration are not amounts due for any dividends for milk so delivered to said Gould & Hugg, to be manufactured on the dividend plan, but was sold to them for a stipulated sum. The cause was tried by the court without a jury and the court found for the appellees for the pen-

alty of the bond and \$1,847.19 damages, being the amount due on dividends, so called, to a large number of patrons.

Upon the evidence it is claimed by appellants that Gould & Hugg did not continue for the said months of January, February and March, 1885, on the dividend plan, but agreed to pay the same price that was paid to like patrons at a certain factory at La Fox and that this was virtually an absolute sale of the milk to Gould & Hugg.

It is also complained that the court erred in refusing the 2d and 3d propositions of law asked by appellants to be held as the law governing the case. We think the court did not err in refusing the propositions. What will or will not amount to a sale is a matter of fact to be determined from the evidence and it depends on the intention of the parties to the transaction whether it will amount to a sale or not. *Callaghan et al. v. Meyers*, 89 Ill. 566; *Moses Straus et al. v. Minzesheimer*, 78 Ill. 492; *Hunt v. Eldridge*, 5 Ill. App. 529. What is a sale is a matter of fact to be deduced from the evidence. At best, if true, the propositions were conclusions of fact. So far as the court found for the appellees we think the evidence justified the finding that there was no sale. It appears that most, if not all, the patrons for whose claims the judgment was rendered only requested the proprietors (Gould & Hugg) to make as good dividends as at La Fox, and that the proprietors agreed to do so if they could and if they could not they would notify the patrons. Many of the patrons did not know of any such arrangement and none of them knew that their dividends would amount to more than actual receipts. By the bond the securities were to pay the dividends that the principals declared on their books, and unless there was fraud in the rendering of the books participated in by the patrons to be affected, the securities are bound by the entries of the dividends. But it is plain that where a sale was made of the milk, as several patrons did, the bondsmen would not be liable for the amounts due such patrons on account of such sales. Another point is made by appellants that too large a judgment has been rendered with reference to the breaches assigned in the declaration. Upon examination we find this objection well taken. Several

Taylor v. Warren.

of the usees whose names appear in the declaration and for whose amounts breaches were assigned, failed to recover. A number of patrons for whose claims no breaches were assigned in the declaration were allowed their amounts in the estimate of damages. This appears plainly from the list of patrons furnished us by counsel for appellees in his brief, with the amounts due each, and whose amounts were, no doubt, estimated in making up the damages, the whole corresponding exactly with the amount of the damages assessed by the court. By comparison of the names with the usees named in the declaration it is found many of them are not named in it and breaches for their amounts not assigned.

For this error the judgment of the court will have to be reversed. The judgment is therefore reversed and the cause remanded to the court below.

Reversed and remanded.

SQUIRE TAYLOR ET AL.

V.

SOLE F. WARREN ET AL., CO-PARTNERS.

Sales—Express and Implied Warranties—Fraud—Instructions.

1. An instruction having no basis in the evidence is erroneous.
2. Where the instructions given ignore the real issues involved in the case this court will reverse.

[Opinion filed May 28, 1888.]

APPEAL from the County Court of De Kalb County; the Hon. CHARLES A. BISHOP, Judge, presiding.

Messrs. I. V. RANDALL and CARNES & DENTON, for appellants.

Messrs. D. W. BAXTER and STEPHENS & CROCKER, for appellees.

BAKER, J. This was assumpsit by S. F. Warren & Co. against appellants for the recovery of \$500, alleged to have been agreed upon between the parties as the price of a one-half interest in a skating rink building, with the skates and other appurtenances, located on a leased lot in the city of De Kalb. The general issue and a special plea were filed, and issues formed on both of them. The special plea was not a plea of fraud and circumvention, as seems to have been supposed in the court below. It did not even allege that the vendors knew, either that there were incumbrances on the building, or that there were not one hundred pairs of skates in the rink. The plea was a somewhat informal, but, perhaps, a substantially good plea, setting up the breach of the warranty in an executory contract for the purchase and sale of personal property, and subsequent rescission of such contract by the vendees on account of such breach of warranty. *Doane v. Dunham*, 65 Ill. 512. *Beebe v. Swartwout*, 3 Gilm. 162, 184; *Voorhees v. Earl*, 2 Ill. 288; *Street v. Blay*, 2 Barn. & Adol. 456.

In the case at bar, verdict and judgment in the trial court were in favor of S. F. Warren & Co., appellees.

There are several controversies of fact involved in the suit and at the trial there was sharp conflict in the testimony. The contention of the plaintiffs was that an unconditional sale of the property in question was made to the defendants for \$500, to be paid by the joint note of defendants due January 1, 1886; that a bill of sale for the moiety of the skating rink property and an assignment of the lease were to be executed and delivered, and that said papers were, in fact, made and tendered, but that defendants refused to receive them or give a note for the consideration money. They also claimed that defendants examined the property and took possession of and operated the rink for several nights, but finding that the city authorities would not permit them to run it without paying a license tax therefor, and that the business was not so remunerative as they had expected, they refused to carry out their contract.

The contention of the defendants was that the bargain made was conditional; that appellees represented there were a certain number of skates; that the property was free from any

Taylor v. Warren.

license tax against it, and made other representations in respect to the condition of the building; and that it was expressly agreed that if the property was not as represented, then it should be no trade; and that the property was not as represented. They also claimed it was not understood, in the event of a trade, that they should give their joint note for \$500, but that it was the agreement appellant Morrell should pay his part of the purchase money in cash, and appellant Taylor his part by note. They also claimed they did not examine the rink, as testified to by Neff, and did not take possession of or run the rink, but that appellant Morrell was merely there on two evenings assisting one Wadsworth, and that Wadsworth was in charge and control of the rink on behalf of appellees, and received all the money taken in, and that the same was paid over to and accepted by appellees.

There was evidence in the case tending to prove express warranties on the part of the vendors, but no evidence whatever on which to base any theory of an implied warranty. The case was also wholly barren of testimony proving or tending to prove any fraud and circumvention on the part of the vendors.

The issues of fact involved in the suit were not fairly submitted to the jury by the instructions of the court. Six instructions were given at the instance of appellees, and not one of them had any proper bearing upon the questions of fact presented by the testimony, but they were all calculated to mystify and mislead the jury. Instructions to a jury should be based upon the evidence in the case on trial. The statement of even correct propositions of law will have the effect to work a wrong and injury if such propositions have no application to the facts which the testimony proves or tends to prove. Here, the instructions given ignored the real issues, and called and confined the attention of the jury to issues not involved in the case. The first, second and fifth of these instructions were well enough as statements of abstract principles of law bearing upon an issue of fraud; and the third and fourth were correct statements of certain rules of law applicable where an implied warranty is claimed. But no supposed case of either fraud or of an implied warranty was

either alleged in the pleadings or suggested by the evidence. *Shackelton v. Lawrence*, 65 Ill. 175.

The sixth and last instruction for appellees was, perhaps, especially vicious. It was as follows :

"If the jury believe from the evidence that the plaintiff, J. C. Neff, stated to the defendants at the time of sale that there were ninety-five pairs of skates in the rink, honestly believing such statement to be true, then such statement does not constitute a fraud, and affords no ground for avoiding such sale."

This was equivalent to directing the jury that, notwithstanding they might find from the weight of the evidence that the contract of sale was executory merely, and that the vendors made warranties which were broken before the contract was performed by either party, or might find that the contract was only a conditional executory contract of sale and the condition failed, yet the vendees would in law be bound to pay the agreed consideration.

The six instructions under consideration were, when applied to the evidence before the jury, all palpably erroneous. From the record there is no assurance that the jury considered and passed upon the real questions presented in the case.

The judgment is reversed and the cause remanded.

Reversed and remanded.

INDEX.

ACCEPTANCE—See BANKS, 1, 2.

ACKNOWLEDGMENTS.

1. An acknowledgment of a deed to which is attached the notary's seal, without his signature, is insufficient. *Clark v. Wilson*, 610

ACTIONS—See TORTS, 1.

1. Where a penalty is imposed without direction as to the mode of procedure for its recovery, an action of debt is a proper remedy. *City of Chicago v. Enright*, 559

2. An action of debt for a penalty for the violation of a municipal ordinance is purely a civil action, and may be brought within two years after the right accrues. *Id.*, 559

3. In such an action, although the record contains an agreed statement of facts, this court is without jurisdiction to fix the amount of the judgment. *Id.*, 559

ADMINISTRATION—See EVIDENCE, 17.

AGENCY—See EVIDENCE, 6, 10, 16; INSURANCE, 6, 8; MECHANIC'S LIEN, 5.

1. Parol authority to fill blanks in a sealed instrument is adequate for that purpose. *Bulkley v. Devine*, 145

2. Upon a bill filed to have a trust deed and the notes secured thereby delivered up to be canceled, it is *held*: That the broker from whom the defendant purchased the notes in question was not her agent to receive payment, such notes not having been left with him; and that she is not bound by his fraudulent representations not made in her presence. *Viskocil v. Doktor*, 232

3. Authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he receives above that sum. It is still his duty to obtain the highest price for which the property will sell and account to his principal for the proceeds. *Kellogg v. Keeler*, 244

4. There can be no ratification of an alleged contract entered into with an agent acting without authority, unless the principal is in possession of a knowledge of the facts. *Bensley v. Brockway*, 410

5. The principal is not bound by the statements of an agent unless they constitute part of the business in question. *Bates v. Sandy*, 552

APPEAL AND ERROR—See EQUITY, 3; ACTIONS, 3; FORMER ADJUDICATION, 8; INJUNCTIONS, 1; JURISDICTION; PRACTICE.

1. In the case presented, certain inadvertent remarks of the trial (659)

APPEAL AND ERROR. *Continued.*

judge, in ruling upon objections, did not operate to the injury of the appellant and do not constitute such error as to require a reversal. *Birmingham Fire Ins. Co. v. Pulver*, 17

2. This court will not reverse for an error which worked no injury to the appellant. *Blanchard v. L. S. & M. S. Ry. Co.*, 22

3. Where the evidence is sharply conflicting this court will not interfere with the verdict of the jury. *Chicago City Ry. Co. v. Robinson*, 26

4. Where the trial was without a jury, and it does not appear from the bill of exceptions that the defendant excepted to the finding or moved for a new trial, he can not, in this court, challenge the sufficiency of the evidence to support the finding. *Firemen's Ins. Co. v. Peck*, 91

5. A general objection of variance between the declaration and proof is insufficient. That it may be available by exception, in what it consists must be made to appear. *Start v. Moran*, 119

6. An objection can not be first raised in this court. *Id.*, 119

7. An appeal lies to this court from the County Court. *Hide & Leather Nat. Bk. v. Rehm*, 172

8. Where there is manifest error in the instructions, which may have injured the appellant, this court will reverse, unless it appears that such error did not affect the result. *Roby v. Murphy*, 395

9. When the evidence is conflicting, and the right of the successful party is not clear, this court will reverse for an error in the instructions which may have misled the jury. *Id.*, 395

10. Where the bill of exceptions contains no motion for a new trial, and no exception is preserved to the overruling of such a motion, an assignment of error that the court erred in refusing a new trial on the ground that the verdict was contrary to the evidence, can not be considered by this court. *Butt v. Lee*, 419

11. A statement in the judgment order, as copied by the clerk into the record, to the effect that the motion for a new trial was overruled and a new trial denied, does not make such motion a part of the record. *Id.*, 419

12. To sustain a decree upon appeal, the evidence must be preserved in the record, or facts found from the evidence sufficient to warrant the relief granted, must be recited in the decree. *Wistar v. Herting*, 443; *South Park Coms. v. Phillips*, 380

13. Where there is a sharp conflict of evidence on material points in the case and no error of law intervenes, the verdict of the jury is conclusive. *Nix v. Whiteside*, 463

14. This court will not reverse a judgment because of improper modifications of an instruction which could not have misled the jury to the injury of the appellant. *C. M. & St. P. Ry. Co. v. Snyder*, 476

15. This court declines to discuss the instructions in detail, the appellant having failed to include them in the abstract. *Chapman v. Chapman*, 487

16. This court will not consider a suggestion that it is without juris-

APPEAL AND ERROR. *Continued.*

diction of an appeal where the case has been presented on the merits by briefs on both sides. *Watson v. The People*, 493

17. Where the evidence is conflicting, the verdict of the jury is conclusive. *Cooper v. Johnson*, 504

18. Where the verdict includes excessive interest, this court may permit the appellee to remit the excess to prevent a reversal. In such a case the appellant will recover costs in this court. *Id.*, 504

19. This court will not interfere with the finding of the jury on a point as to which the evidence was conflicting and no instructions were asked. *Fadner v. Filer*, 506

20. The action of the court in overruling a motion made by the defendant during the trial, for leave to file a plea of justification, must be presumed correct, no plea having been prepared or presented, and there being nothing in the record to show why the motion was overruled. *Id.*, 506

21. That the evidence is not only contradictory but unsatisfactory, this court being unable certainly to discover the process by which the jury reached their conclusion, does not justify an interference with the verdict. *Hamburgher Co. v. Lery*, 570

22. In order to pass upon the merits of the action of a court on a motion, the grounds of the same and the collateral facts must appear in a bill of exceptions, unless the order of the court discloses the grounds upon which it acted. *Erans v. The People*, 616

ASSIGNMENTS—See BILL OF EXCEPTIONS, 1; JURISDICTION, 3.

1. Upon the distribution of an estate under an assignment, creditors who held collateral security are entitled to share equally with unsecured creditors in any and all dividends paid. *Mechanics Loan & Trust Co. v. American Ex. Nat. Bk.*, 154

2. Where a holder of collaterals has converted them into cash on the faith of an order of court that he might do so without prejudice, his rights are not thereby affected, the court having no power to require him to make the change. *Id.*, 154

3. Upon appeal from a decretal order of the County Court in a matter of an assignment, this court holds that the evidence sustains the finding of the court below that the insolvent had formed the determination and was preparing to make the assignment when he gave the notes and warrants of attorney on which judgments were confessed. *Hide and Leather Nat. Bk. v. Rehm*, 172

4. The County Court can not be required to try and determine intricate and conflicting claims to property before authorizing the assignee of an insolvent to sell whatever interest the estate possesses therein. *Osborne v. Gibbs*, 246

5. What to order the assignee to dispose of is within the discretion of the County Court. In the case presented this discretion has not been abused, the orders in question being for the sale of an option to purchase certain real estate. *Id.*, 246

6. It is the policy of the law to secure to resident creditors of a for-

ASSIGNMENTS. *Continued.*

eign insolvent priority over foreign creditors as to assets here situated.
Webster v. Judah. 294

7. An order of the County Court directing the assignee of an insolvent's estate to pay to the receiver of a foreign insolvent's estate all dividends thereafter declared on a claim held by the latter, is not a final order. It may be set aside on good cause shown at any time before the payment of the final dividend. *Id.*, 294

8. In the case presented the County Court should have granted the petition of the appellant for leave to garnishee the assignee of a resident insolvent, on a claim against the estate of the foreign insolvent.
Id., 294

9. The County Court is not a court of equity for the disposition of all incidental disputes between creditors of insolvents and third parties growing out of antagonistic claims to dividends payable from the insolvent estate. *Id.*, 294

ATTACHMENT.

1. Upon the trial of an attachment issue, under clause 6, Sec. 1, Chap. 11, R. S., it need not appear that the grantee participated in the fraudulent intent of the grantor to hinder or delay his creditors.
Spear v. Joyce, 456

2. Where only the interests of the grantor are involved, only his intention is material. *Id.*, 456

3. This court sustains the action of the court below in instructing the jury, at the close of the plaintiff's case, to find for the defendant as to the attachment issue, the evidence being insufficient to sustain a verdict for the plaintiffs. *Hosmer v. Teller*, 488

ATTORNEYS—See LIENS, 1, 2.

ATTORNEY'S FEES—See CORPORATIONS, 7; COSTS, 1; EQUITY, 3; TRUST DEEDS, 5.

1. In an action against a county to recover compensation for services rendered as special counsel, this court holds, upon the agreed statement, that the employment of the plaintiff was binding upon the defendant.
Gibbons v. County of Cook, 213

AUCTIONS—See SALES, 6, 7.

BANKS.

1. A bank is not bound to accept, by telegram, the checks or drafts of its depositors, although in possession of funds. Its duty is to pay or accept only upon presentation. *Myers v. Union Nat. Bk.*, 254

2. A telegram by a bank to the holder of checks of a depositor stating that "drafts named are good now," is not an acceptance. *Id.*, 254

3. A bank may appropriate the funds of a depositor to pay an indebtedness to itself, after receiving notice by telegram that the holder of checks of such depositor has sent a messenger to present them. *Id.*, 254

4. In an action on a check drawn on the defendant bank in favor of

BANKS. *Continued.*

a third party and by him deposited in the plaintiff bank in the usual course of business, after the defendant had refused to certify it, upon a review of the evidence, it is *he'd*: That the defendant was in funds with which to pay the check when it was presented; and that certain drafts and a letter of credit were then treated by the defendant as being to the credit of the drawer. *Am. Exch. Nat. Bk. of Chicago v. Chicago Nat. Bk.*, 538

5. It seems that the presentation of the check to the defendant's cashier before the opening of the bank and his statement that payment had been stopped and that it would not be paid if tendered for payment, rendered further presentation unnecessary, the rights of the parties being fixed by the condition of the drawer's account at that time. *Id.*, 538

BASTARDY.

1. In bastardy proceedings evidence tending to prove the poverty of the mother, or that she has named the child after the reputed father, is inadmissible. *Corcoran v. The People*, 638

2. Under the circumstances of the case presented, this court approves the action of the trial court in permitting certain young men to testify that they had never had sexual intercourse with the prosecuting witness. *Id.*, 638

BILLS OF EXCEPTIONS—See APPEAL AND ERROR, 10, 22.

1. This court affirms an order of the County Court allowing a claim against an insolvent estate, what purports to be a bill of exceptions being substantially defective. *Winona Paper Co. v. W. O. Taylor Co.*, 558

BILLS OF REVIEW—See FORMER ADJUDICATION, 2.

1. An original bill in the nature of a bill of review, as well as a bill of review proper, must be brought in the court in which the decree sought to be reviewed was rendered. *Windett v. Conn. Mut. L. Ins. Co.*, 68

BLANKS—See AGENCY, 1.

BOARD OF TRADE.

1. The charter of the Board of Trade of the City of Chicago imposes upon that body no duty of a public nature. The individual business of each of its members is private, and their aggregate business is of like character. *N. Y. & Chicago Grain & Stock Ex. v. Chicago Board of Trade*, 93

2. There can be no public policy controlling any course of business unless some public interest will be affected by the failure of such control. *Id.*, 93

3. The Board of Trade of the City of Chicago may collect the market quotations on the floor of its exchange, send them to the telegraph companies as its private dispatches to persons named as its correspondents, and prohibit such companies from transmitting them to any person except those so designated. *Id.*, 93

BOARD OF TRADE. *Continued.*

4. A person who is not a member of the board, but has been on its list of correspondents, is not entitled to an injunction to prevent the removal of the "ticker" from his office, and to compel the board to continue to furnish him its market quotations. *Id.*, 93

BONDS—See PRACTICE, 32; REPLEVIN, 1, 3.

1. The liability of a surety on an appeal bond will not be extended by implication or construction beyond the precise terms of his undertaking. *Foster v. Epps*, 235

2. In the case presented, the Appellate Court having affirmed the judgment but eliminated from the record a finding that the amount due the plaintiff was for wages as a laborer and servant, this court holds, in an action on the appeal bond, that the judgment was affirmed within the precise terms of the condition of the bond. *Id.*, 235

3. In an action on a bond to secure the patrons of a cheese factory, it is *held*: That the bondsmen are only liable on account of dividends and not in cases, if any, where direct sales of the milk were made; and that the judgment is erroneous because for a larger sum than is justified by the breaches assigned in the declaration. *Gould v. Warne*, 651

BROKERS.

1. Brokers in mining stocks are embraced within an ordinance of the city of Chicago, which renders it unlawful for any person to exercise, within the city, the business of a money changer or banker, broker or commission merchant without a license therefor. *Hustis v. Pickards*, 270

2. A broker who has purchased mining stock for a third party, in violation of such ordinance, without a license, can not maintain an action for commissions. *Id.*, 270

3. Where the description of real estate is placed in the hands of a broker with instructions to sell it at a given price and through his instrumentality a party is brought into negotiation with the owner, and a sale is in consequence effected by the owner, the broker is entitled to commissions. *Keeler v. Grace*, 427

4. It is sufficient to entitle the broker to compensation that the sale is effected through his agency as a procuring cause. *Id.*, 427

CARRIERS—See EXPLOSIVES, 1; PRACTICE, 26.

1. In an action against a steamship company to recover damages for the failure of the defendant to carry a certain box of goods from Hamburg to New York and deliver the same to the plaintiff, it is *held*: That it was the duty of the defendant to deliver the goods at New York to the plaintiff; that its liability as a common carrier continued for a reasonable time to enable the plaintiff to claim and take possession of her goods; that there was no want of diligence on her part; that upon the defendant's theory of the facts the seizure by the custom officers resulted from the wrongful act of a mere intruder before the termination of the defendant's liability as a common carrier; that this court can not set aside the verdict as excessive, the evidence being conflicting and two juries having reached substantially the same result. *Hamburg Am. Packet Co. v. Gattman*, 182

CHATTEL MORTGAGES—See FIXTURES, 1.

CHILDREN—See DIVORCE, 2, 3.

CONSPIRACY—See CRIMINAL LAW, 1.

CONTRACTS—See EVIDENCE, 4; GAMING, 1, 3; LIMITATIONS, 2; MECHANIC'S LIEN; MUNICIPAL CORPORATIONS, 5, TENDER 1, 2.

1. In the case presented, it is *held*: That the sum found due upon an accounting between the husband and his co-partner was at least a sufficient equitable consideration for the note and assignment of the insurance policy and benefit certificate, which were executed by the husband and wife; that the waiver by said co-partner of his legal right to terminate the contract of partnership was an additional consideration; and that such assignment was not against public policy. *Martin v. Stubbins*, 121

2. Where there is a renunciation of a contract by one of the parties before the time for performance, the contract will remain in existence for the benefit, and at the risk of both parties, unless the other party accepts the renunciation and treats the contract as broken as soon as it is announced. *Plumb v. Taylor*, 278

3. Where a vendor, by agreement, has undertaken to furnish the vendee "an abstract of title showing good title and power and authority to sell and convey," the deposit made by the latter to be returned and the contract determined in case of failure to show good title, and the abstract furnished shows such title, although in fact it is in dispute, the vendor can not place the vendee in default by the tender of the deed. *Cravener v. Hale*, 275

4. In the case presented it is *held*: That the contract is to be construed most strongly against the vendor; that he did not bring himself within the condition authorizing a rescission; and that he could not rescind for non-performance by the vendee, as he was not himself in a condition to perform. *Id.*, 275

5. As a general rule a contract can not be determined or rescinded by a party to it unless he is in a position to demand a specific performance. *Id.*, 275

6. An agreement for liquidated damages for the breach of a condition in a contract of sale of a business that the vendor will not open a similar business within a certain distance and within a certain time, will be enforced unless it appears that the amount named is oppressive and unjust. *Mueller v. Kleine*, 473

7. A promise not to attach the property of a third person, where no ground of attachment exists, is not a consideration for a promise to pay an indebtedness of such third person. *Bates v. Sandy*, 552

CORPORATIONS—See INSOLVENCY; TRUST DEEDS, 4.

1. Where a receiver has been appointed in proceedings on a creditor's bill and the property assigned includes stock of a corporation, the court may order the defendant to execute a proxy or power of attorney enabling the receiver to vote the stock at meetings of the stockholders of the corporations. *Atkinson v. Foster*, 63

CORPORATIONS. *Continued.*

2. In an action by the assignee of a certificate of stock against a corporation to recover damages for the wrongful refusal of the defendant to allow a transfer on its books, the death of the original holder of such certificates does not render the plaintiff incompetent as a witness. *Firemen's Ins. Co. v. Peck*, 91

3. The president and treasurer of a corporation have no implied power to execute a power of attorney to confess a judgment against such corporation. They can only exercise such power when it has been given to them in express terms by the board of directors. *Adams v. Cross Wood Printing Co.*, 313

4. In the case presented, in the absence of the corporate seal, there was not even *prima facie* authority to enter the judgments in question, and such judgments and the executions issued thereon are void and may be assailed by any person interested. *Id.*, 313

5. All subscriptions to the capital stock of a corporation are presumably upon the same basis, all shares being entitled to the same benefits, and subject to the same burdens. *Alling v. Wensell*, 511

6. Upon a bill to charge the defendants on account of their individual liability as stockholders in a corporation, it is held: That the acceptance by the corporation of property of imaginary value, in full payment for one-third of the capital stock, does not enable the holders to throw the entire burden of the debts of the company upon subsequent subscribers who had no notice of the transaction; that a contract for such acceptance made by the directors with two of the five directors, when only four were present, is invalid; that it is no ground of objection that some claims were without affidavit; that they were justly due, if such claims were sufficiently proved by other evidence; that the book entitled "Claim Ledger," so far as made up in the course of business, is evidence of the indebtedness shown by it; that the belief of a witness is not evidence; that the fund obtained from the stockholders is not chargeable with the fees of complainant's solicitors; and that the order or decree should require the defendants to pay to the receiver the amounts for which they have been found to be liable. *Id.*, 511

7. The amounts for which the individual stockholders are liable, constitute a fund from which the expenses of getting it into the hands of the receiver, as well as the claims of the creditors, are to be paid. Such expenses do not include the fees of the complainant's solicitors. *Id.*, 511

8. An agreement operating between the stockholders of a corporation only, for an apportionment of their several stock liabilities, is neither contrary to law nor public policy. *Winston v. Dorsett Pipe and Paving Co.*, 546

9. Upon a bill filed by a stockholder to wind up a corporation, and to have an assessment made upon the unpaid stock for the payment of debts, it is held: That, as between the stockholders, the estate of one of the subscribers to the capital stock of the corporation is not liable on certain shares subscribed for "in trust," and that the court properly reserved the right to make further assessments if necessary. *Id.*, 546

CORPORATIONS. *Continued.*

10. Creditors of corporations organized under or subject to the provisions of the act of 1872, pursuing their remedies against the holders of the stock wholly or partially unpaid, can do so, except so far as Sec. 8 applies, only in the manner provided in Sec. 25 of that act. *Curran v. Bradner, Smith & Co.*, 582

11. To enforce such liability the bill must be by or on behalf of all the creditors against all the stockholders. *Id.*, 582

12. This court reverses a decree which charges a single stockholder and makes no finding as to whether the assets of the corporation were exhausted. *Id.*, 582

13. A corporation is not authorized to proceed to business until the certificate of complete organization and a copy of all papers filed with the Secretary of State have been duly recorded. *Ricker v. Larkin.* 625

14. Where such papers have been fraudulently and surreptitiously recorded contrary to the agreement of the incorporators, such record is of no effect. *Id.*, 625

15. An injunction lies to prevent one of the incorporators of a proposed corporation from doing business in its name before it is duly incorporated. *Id.*, 625

COSTS—See APPEAL AND ERROR, 18.

1. Upon the dismissal of an appeal under the act of June 14, 1887, this court may allow as part of the costs a reasonable solicitor's fee, and where such dismissal is in vacation, the allowance may be made at the ensuing term. *Curtis v. Williams,* 497

COUNTY COURT—See APPEAL AND ERROR, 7.

COVENANTS—See TENDER, 1.

CREDITOR'S BILLS.

1. Upon a creditor's bill a court of equity has ample power to reach assets in the hands of any person who is holding them without legal right, and to apply them in satisfaction of the claims of judgment creditors. *Adams v. Cross Wood Printing Co.*, 313

CRIMINAL LAW—See GAMING; INJUNCTIONS, 4; LIMITATIONS, 3; MALICIOUS PROSECUTION, 1, 2; STATUTES, 1.

1. False bookkeeping and false reports to conceal an embezzlement will not support a charge of conspiracy to obtain money by false pretenses. *Watson v. The People,* 493

2. The word "obtain" is not used in the statute as synonymous with the word "retain." *Id.*, 493

3. Penal laws are strictly construed. The law regards primary or proximate, not secondary or remote causes. *Id.*, 493

4. The term at which the accused is committed is not regarded as the first term under the statute providing for a discharge for want of prosecution. Where the defendant is on bail, it will be presumed that the case was continued at a subsequent term or terms by mutual consent, unless the record shows that he appeared and demanded trial. *Id.*, 493

DAMAGES—See CONTRACTS, 6; FORMER ADJUDICATION, 5, 6; INJUNCTIONS, 1, 2; INSTRUCTIONS, 21; LIBEL AND SLANDER, 1.

DECREES—See JUDGMENTS AND DECREES.

DEEDS—See EVIDENCE, 21, 22; MORTGAGES, 2; TAXES; TRUST DEEDS.

DESCENT.

1. Upon the death of a husband leaving no child or children or descendants of a child or children, the widow is entitled to the entire proceeds of mutual benefit certificates payable "to the heirs at law" of the deceased. *Alexander v. N. W. Masonic Aid Ass'n*, 29

DIVORCE.

1. It is sufficient in a bill for divorce for extreme and repeated cruelty, to make such allegations as will admit the proof of cruelty and of at least two distinct acts of personal violence. Such distinct acts may be alleged as occurring on the same day. *Campbell v. Campbell*, 309

2. Where a decree of divorce provided that the children should remain under the care, custody and tuition of the mother, until the further order of the court, and such decree has not been brought to this court for review, upon a petition by the father to have the custody of the children changed, the inquiry is limited to matters set up in the petition, arising since the entry of the decree. *Umlauf v. Umlauf*, 375

3. Upon the entry of a decree of divorce, the court will chiefly regard the good of the children in making provision for their custody. *Id.*, 375

DOGS.

1. In an action to recover damages for injuries alleged to have been inflicted by a vicious dog, it is not necessary to a recovery to show that the defendant knew that the dog had bitten some other person. It is sufficient to show that he had knowledge that it had shown a disposition to bite or attack others. *Kolb v. Klages*, 531

2. In the case presented it is *held*: That evidence tending to show what made the dog savage, though improperly admitted, could not have injured the defendant; that there is no error in the instructions, nor in requiring a *remittitur*. *Id.*, 531

DRAINAGE—See HIGHWAYS.

EQUITY—See PRACTICE, 5.

1. An offer in the bill to secure the cancellation of certificates of sales for taxes, to pay whatever moneys, taxes and interest equity may require, is a sufficient offer to do equity. *Sankey v. Seipp*, 299

2. A court of equity having custody of a fund is the proper forum in which to assert an equitable lien thereon. Where an intervening petition is filed for that purpose, and the defendant answers, he thereby submits the issue to the court and is bound by its action. Whether the issue shall thereafter be submitted to a jury is wholly within the discretion of the chancellor. *South Park Com. v. Phillips*, 380

3. In the case presented it is *held*: That the master's report contains findings of fact which fully support the decree; that the confirmation of the report by the decree was, in legal effect, the adoption of

EQUITY. *Continued.*

such findings as the basis of the decree; that the defendant should have preserved the evidence in the record, if he desired to have this court review the findings of fact upon which the decree is based; and that the question of lien for attorney's fees is not involved, as the lien sought to be asserted grew out of an express contract and assignment of a portion of the fund. *Id.*, 380

ESCROW—See TENDER, 2.

ESTOPPEL—See INSURANCE, 3; TRUST DEEDS, 4.

EVIDENCE—See BASTARDY, 1, 2; CORPORATIONS, 2, 6; DOGS, 2; FACTORS, 2; FRAUD, 2; INSTRUCTIONS, 12; INSURANCE, 2; MALICIOUS PROSECUTION, 2; MECHANIC'S LIEN, 4, 7; MORTGAGES, 1, 2; REPLEVIN, 2; TORTS, 3; TRESPASS, 2.

1. It is proper to reject evidence which is inadmissible for the purpose for which it is offered, although admissible for other purposes. The party making the offer will be confined in this court to the offer made at the trial. *Village of Jefferson v. Chapman*, 43

2. The courts do not take judicial notice of the Municipal Code of Chicago. *People v. City of Chicago*, 217

3. Parol evidence is admissible to prove the consideration for a note and a written assignment of an insurance policy and benefit certificate as security therefor. *Martin v. Stubbins*, 121

4. The waiver of a legal right is a sufficient consideration for a promise. *Id.*, 121

5. In an action to recover for a bill of lumber delivered upon a written order, evidence of a subsequent conversation tending to prove an agreement touching a detail of the transaction as to which the written order was silent, is admissible. *Story v. Carter*, 287

6. Where a witness testifies that he acted as the agent of the plaintiff in making a sale, the question whether the property sold belonged to him is immaterial. *Id.*, 287

7. In the absence of evidence to the contrary, it will be presumed in the courts of this State that the common law prevails in the other States. *Van Ingen v. Brabrock*, 401

8. Where a wife, who has lived with her husband in Massachusetts and Missouri, brings money to this State and invests it in business in her own name, it will be presumed, in the absence of contrary evidence, that the title to such money and the personal property of the wife vested in the husband. This court so holds, although the investment was made in the name of the wife, and although the goods have been sold and replaced many times, thereby largely increasing the fund. *Id.* 401

9. In the case presented, in the absence of such evidence, the judgment against the defendants as trespassers for an alleged wrongful levy of an execution against the husband on the property in question, can not be sustained. *Id.*, 401

10. The statements of an agent are admissible against the principal only where they are part of the *res gestæ*. *Bensley v. Brockway*, 410

EVIDENCE. *Continued.*

11. The unsupported evidence of the defendant denying service of process, is insufficient to sustain a bill for relief from a judgment on the ground that he was not served. *Sullivan v. Niehoff*, 421
12. The declarations of a party are not evidence in his favor. *Id.*, 421
13. A writing made to preserve the memory of a fact, in the presence of the witness who then knew and verified its accuracy, may be used to refresh the recollection of such witness if he can not, without it, testify as to such facts. *Hayden v. Hoxie*, 533
14. Unless the necessity for the use of such memoranda is made to appear by the testimony of the witness himself, it is not error to refuse to admit them. *Id.*, 533
15. This court sustains the action of the court below in admitting in evidence certain contracts, it being plain from the entire record that they were with the defendant corporation, although they describe it by a different name than that by which it is sued. *Hamburgher Co. v. Levy*, 570
16. The declarations of an agent are incompetent to charge his principal. *Curran v. Pullman Palace Car Co.*, 572
17. A plaintiff who has made the proper preliminary proof may produce his books of account in evidence in an action against the administratrix of the debtor. *Alling v. Brazee*, 595
18. Testimony of a creditor, in the absence of specific objection, that a certain account book "was his book account and kept by him," is sufficient preliminary proof to warrant the introduction of the same in evidence. *Id.*, 595
19. A statement made by a witness to an attorney, no relation of attorney and client existing between them, is not a privileged communication. *City of Rockford v. Falver*, 604
20. Evidence as to the extent of a city's streets, is not admissible in an action brought to recover for injuries suffered because of an alleged failure to remove snow and ice from a sidewalk. *Id.*, 604
21. The record of an unacknowledged deed will not be received as evidence of its execution. *Clark v. Wilson*, 610
22. Conveyances can not be proved by parol, nor the execution of a deed by the admissions of persons not first shown to have been in privity with the title under which the grantees claims. *Id.*, 610
23. Courts take judicial notice of their own records. *Evans v. People*, 616
24. A question calling for the conclusion of the witness is improper. *Chamberlain v. Iain*, 634
25. To admit evidence upon the ground that it is desired to prove a certain immaterial fact, when the result will be to produce hearsay evidence, not within any of the exceptions to the rule prohibiting the introduction of such evidence, is reversible error. *Gurney v. Brown*, 640

EXPLOSIVES.

1. An ordinance making it unlawful to store or keep for sale within the city limits any crude petroleum, or to keep any quantity of crude petroleum or refined carbon oil, exceeding one barrel, in any part of a building except the cellar, is violated by a railroad company in keeping in its warehouse for a reasonable time such articles for transportation. *Wright v. C. & N. W. Ry. Co.*, 200

FACTORS—See BROKERS.

1. A factor who has made advances in the same line of business to the consignor, is entitled to a lien on stock consigned to him, unless a sufficient reason to the contrary is shown. *Hunter v. Mathewson*, 192
2. In the case presented it is *held*: That the question whether a certain transaction between the consignor and the plaintiffs, who were third parties, amounted to a sale, was for the jury; that the question whether the consignee, the defendant herein, was a *bona fide* purchaser was not involved; that evidence tending to show an agreement between the consignor and consignee, prior to the shipment, for the payment of said advances out of the proceeds, is competent; that, in order to lay the proper foundation for an implied waiver by the defendant, it was necessary that the evidence should tend to show that he had notice of the plaintiffs' interest in the cattle or proceeds; and that certain of the instructions were erroneous. *Id.*, 192
3. A factor, in enforcing his lien, occupies in no sense the position of a purchaser. *Id.*, 192

FALSE PRETENSES—See CRIMINAL LAW, 1, 2.

FIXTURES.

1. Whether articles which are attached to a building and can be removed without injury become part of the realty or remain movable fixtures, depends upon the intention of the party affixing them. *Andreus & Co. v. Chandler*, 103
2. Upon a bill filed by the mortgagee in a mortgage on an opera house to enjoin the foreclosure of a chattel mortgage on the opera chairs contained in such opera house, it is *held*: That it was the intention of the mortgagor that the chairs should remain personal property; that the rights of the complainant are not affected by the giving of a new chattel mortgage upon the expiration of the first; that under the state of facts disclosed by the record the preliminary injunction should be dissolved. *Id.*, 103

FORCIBLE ENTRY AND DETAINER—See LANDLORD AND TENANT, 3, 12, 13.

1. The action of forcible entry and detainer is a special statutory proceeding, summary in its nature and in derogation of the common law. The statute conferring jurisdiction must, therefore, be strictly pursued in the method of procedure prescribed by the statute. *Wilder v. French*, 76
2. The Circuit and Superior Courts, in taking cognizance of cases under the statute of forcible entry and detainer, exercise a special, stat-

FORCIBLE ENTRY AND DETAINER. *Continued.*

tory and extraordinary power, and stand upon the same ground and are governed by the same rules as courts of limited and inferior jurisdiction. In such cases nothing is within the jurisdiction but that which expressly so appears upon the face of their proceedings. *Id.*

76

3. The entry of a judgment by confession upon warrant of attorney contained in a lease is impliedly prohibited by the particular mode of proceeding prescribed by the forcible entry and detainer act. *Id.*, 76

4. In an action of forcible entry and detainer inquiry can not be made into the title of the premises in question. Hence it is no defense that the defendant entered without any actual force or breach of the peace under claim of an adverse title. *Pederson v. Cline*, 249

FORMER ADJUDICATION.

1. A former adjudication by a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties were bound to litigate and bring to a decision as an incident to, or essentially connected with, the subject-matter in litigation. *Windett v. Conn. Mut. L. Ins. Co.*, 68

2. Where the mortgagor has permitted a decree *pro confesso* in the United States Circuit Court, upon a bill to foreclose a mortgage, filed in violation of an agreement to extend the time of payment, he can not maintain in a State court an original bill in the nature of a bill of review to redeem from the sale under such foreclosure. *Id.*, 68

3. Upon a second trial, after a general reversal, even if the opinion of this court could be considered, its application to part of the case as a former adjudication would have to be clearly made out. *Wright v. C. & N. W. Ry. Co.*, 200

4. The doctrine of *res adjudicata* extends to the grounds of recovery and defense which might have been but were not presented. *Swantz v. Muller*, 320

5. Where the owner of lands has brought suit to recover damages for property as well as present damages, alleged to have resulted thereto from the erection of a dam and changes in the flow of water, he can not subsequently maintain an action to recover damages for the depreciation in the value of his land. *Id.*, 320

6. The recovery of merely nominal damages in the first action does not warrant the presumption that the question of permanent injury was not considered by the jury. *Id.*, 320

7. Upon a second appeal, the decision of the Supreme Court, on appeal from the former decision of this court, is conclusive of the questions then involved. *C., M. & St. P. Ry. Co. v. Snyder*, 476

8. A record of dismissal, unless it appears otherwise therein, is a bar to a second appeal. *Evans v. The People*, 616

FRAUD—See POWERS, 3; PRACTICE, 33; REPLEVIN, 2; TRESPASS, 2.

1. A re-sale of goods to the vendor, the possession remaining with the vendor, is void as to a subsequent *bona fide* purchaser without notice. *Lapp v. Pinover*, 169

FRAUD. *Continued.*

2. General representations made by a vendor as to the value of property he offers for sale, will not be regarded as evidence of a fraudulent intent except in extreme cases. *Welling v. Schiller*, 284
3. In an action on a promissory note given in payment for certain shares of the capital stock of a corporation, it is *held*: That the court below properly sustained a demurrer to special pleas of failure of consideration by reason of fraudulent representations, the allegations of fraud being insufficient to show failure of consideration. *Id.*, 284
4. The mere suppression of facts as to his financial standing by a purchaser of goods, is not fraudulent, unless his intention is to obtain possession of the goods and not pay for them. *Lewis v. Reticker*, 601

GAMING.

1. An agreement to sell a certain number of shares of the capital stock of a street railway company at a stipulated price, if taken on or before a future date, is to be regarded as a contract giving the option to buy such shares of stock at a future time. It is, therefore, within the prohibition of Sec. 130 of the Criminal Code. *Schneider v. Turner*, 220
2. The instrument in question, in the case presented, can not be regarded merely as a proposition which could be accepted if not withdrawn within the time limited. The word "agree" imports a consideration, and it is not competent for the plaintiffs by averment and parol evidence, to show a want of consideration. *Id.*, 220
3. When such a contract is precisely within the letter and spirit of the statute it is void, without regard to the question of intent. *Id.*, 220
4. The loser of money lost in such gaming as is prohibited by Sec. 130, Criminal Code, may maintain an action for its recovery. *New York and Chicago Grain and Stock Exch. v. Mellen*, 556
5. Traffic in differences which are determined by chance is gaming within the meaning of Sec. 130, Criminal Code. *Id.*, 556

HIGHWAYS.

1. In proceedings under Sec. 8, Chap. 121, R. S., it is not necessary to seek the consent of the owner of land through which the proposed ditch is to be cut, where he has shown himself by his acts to be opposed to the same. *Chaplin v. Highway Commissioners*, 643
2. The adjudication of the justice and jury as to the necessity of the drain and the damage done, is final. *Id.*, 643
3. The statute allows proceedings to be instituted and carried on for the purpose of carrying off the water from a highway without reference to whether there is a slough or pond therein. *Id.*, 643
4. Where the center of a road is coincident with a town line, and one town has charge of the same by allotment, it may maintain proceedings under the statute in the names of both towns, at least until objection is made by the commissioners of the other town, a private party having no right to object. *Id.*, 643

HIGHWAYS. *Continued.*

5. In the case presented the evidence does not show that the proceedings were solely for the benefit of third persons. *Id.*, 643

HUSBAND AND WIFE—See DESCENT, 1; EVIDENCE, 8; PRACTICE, 24.

INJUNCTIONS—See BOARD OF TRADE, 4; FIXTURES, 1; JURISDICTION, 2; MUNICIPAL CORPORATIONS, 4, 5.

1. A judgment for damages assessed on the dissolution of an injunction, can not be supported on appeal, unless the evidence authorizing it is preserved in the record. *Reich v. Berdel*, 265

2. Upon the dissolution of an injunction restraining the prosecution of certain suits before a justice to recover rent, it is improper to assess as damages the amount of rent involved in such suits, unless it appears from the evidence that such rent became lost by reason of the injunction. *Rosenthal v. Boas*, 410

3. Upon the dissolution of an injunction the opinion of an attorney as to the reasonable value of his services, is an insufficient basis for an allowance for solicitor's fees. Only the usual and customary fee paid, or for the payment of which the defendant has become liable, should be allowed. *Id.*, 450

4. Courts of chancery have no jurisdiction to enjoin criminal or quasi criminal prosecutions. *Skakel v. Roche*, 423

5. This court affirms a decree dismissing a bill to restrain the mayor and chief of police of the city of Chicago from interfering with the complainant in conducting a saloon, and from prosecuting him under ordinances which he alleges to be void. *Id.*, 423

INSOLVENCY—See ASSIGNMENTS.

1. A director of an insolvent corporation can not apply its assets to the payment of a claim due himself to the exclusion of other creditors. *Adams v. Cross Wood Printing Co.*, 313

INSTRUCTIONS—See APPEAL AND ERROR, 8, 9, 14, 15; ATTACHMENTS, 3; DOGS, 2; LANDLORD AND TENANT, 9; MUNICIPAL CORPORATIONS, 6; MALICIOUS PROSECUTION, 4; PERSONAL INJURIES, 4, 6; SALES, 5; TRESPASS, 2.

1. It is a matter of discretion with the court to give instructions cautioning the jury against prejudice toward one party, or favor to the other. *Birmingham F. Ins. Co. of Pitts. v. Pulver*, 17

2. Appellant can not complain of the refusal of the court to give instructions asked, when every material issue in the case was fully and properly submitted to the jury by instructions prepared by the court. *Id.*, 17

3. It is proper to refuse instructions touching an issue which is immaterial upon the theory of the case as tried. *Village of Jefferson v. Chapman*, 43

4. The court may properly refuse to give instruction which states an abstract proposition of law. *Ames v. Moir & Co.*, 88

5. Where the evidence is conflicting and there is no clear preponderance, unless each instruction on behalf of the successful party was

INSTRUCTIONS. *Continued.*

accurate and free from all error calculated to mislead the jury. the judgment must be reversed and the cause remanded. *Star & Crescent Milling Co. v. Thomas*, 137

6. In an action by an employe of the defendant corporation to recover damages for a personal injury resulting from the fall of a freight elevator this court holds that an instruction, which purports to direct the jury as to all the elements necessary to a recovery by the plaintiff, improperly assumed material facts in controversy and ignored essential issues of the case. *Id.*, 137

7. An instruction which purports to embrace every element essential to a recovery, is defective if any material element is omitted. *Lapp v. Pinover*, 169

8. It is improper for the court, in giving instructions, to pass upon the facts of the case. *Hunter v. Mathewson*, 192

9. It is proper to refuse an instruction on an immaterial issue, or one that has no basis in the evidence. *Story v. Carter*, 287

10. It is improper to submit an instruction touching a point upon which no evidence was introduced. *Security Ins. Co. v. Mette*, 324; *Ill. Mut. Ins. Co. v. Mette*, 330

11. An instruction stating an abstract principle of law which is pertinent to the case, can not be assigned as erroneous, unless it has a tendency to mislead the jury. *C. & N. W. Ry. Co. v. Johnson*, 351

12. The law of another State is matter of fact to be determined by the jury from the evidence introduced. An instruction stating the law of another State would, therefore, be improper. *Id.*, 351

13. It is the sole province of the jury to determine the weight of evidence, and to consider conflicting evidence, without assistance from the court. *C. & N. W. Ry. Co. v. Dunleavy*, 438

14. It is proper to refuse an instruction to the effect that positive evidence as to the occurrence of a fact is entitled to greater weight than negative evidence regarding it. *Id.*, 438

15. It is proper to refuse an instruction which, in effect, tells the jury to believe the witnesses for one party and to disbelieve those of the other party to the case on trial. *Id.*, 438

16. An instruction touching an irrelevant matter should be refused. *Id.*, 438

17. It is proper to refuse an instruction which correctly states a rule of law applicable to the case, which finds appropriate expression in other instructions given. *Id.*, 438

18. An instruction stating the rule as to comparative negligence is defective, unless it requires the jury to compare the negligence of the respective parties and from such comparison determine whether the one is slight and the other gross. *C., M. & St. P. Ry. Co. v. Mason*, 450

19. Where the evidence is conflicting and the case one which appeals strongly to the sympathy of the jury, the instructions must be accurate and clear. *Id.*, 450

20. In an action by the father against a railroad company to recover

INSTRUCTIONS. *Continued.*

damages for causing the death of a child of tender years, it is *held*: That the instructions for the plaintiff improperly ignored the question of the father's negligence; and that this error was not corrected by the instructions given for the defendant. *Id.*, 450

21. In an action to recover damages for a personal injury, it is proper to instruct the jury that, in estimating the plaintiff's damages, they may take into consideration the permanent character of the injury, although there is no averment of permanent injury contained in the declaration. Nor can the defendant object that such an instruction leaves the jury to find damages for the probable effect of the injury. *N. C. City Ry. Co. v. Gastka*, 518

22. In the case presented, an instruction touching the preponderance of the evidence and credibility of witnesses, is approved by this court. *Id.*, 518

23. It is proper in an instruction to refer the jury to the declaration for a statement of facts necessary to charge the defendant with liability. *Id.*, 518

24. It is not error for the court to modify an instruction when the effect is simply to express the law applicable to the case. *Lewis v. Reticker*, 601

25. The appellant can not complain of an instruction given at the request of the appellee, which is substantially like one given upon his own request. *City of Rockford v. Falter*, 604

26. It is error to give an instruction having no basis in the evidence. *Bensley v. Brockway*, 410

27. An instruction having no basis in the evidence is erroneous. *Taylor v. Warren*, 655

28. Where the instructions given ignore the real issues involved in the case this court will reverse. *Id.*, 655

INSURANCE—See PLEADING, 3.

1. In an action on a policy of fire insurance the amount of loss is a question for the jury, and the recovery is not limited to the amount stated as the loss in the notary's certificate. *Birmingham Fire Insurance Co. of Pitts. v. Pulter*, 17

2. The opinion of a witness as to the quantity of the goods burned, formed from an inspection of the debris, is inadmissible. *Id.*, 17

3. In an action involving the right of the plaintiff to recover on a policy of fire insurance, the Supreme Court having reversed the judgment on the ground that this court had failed to certify whether a subsequent policy was issued in lieu of the policy in question, it is *held*: That said subsequent policy was not so issued; that the defendant issued said policy and paid the loss thereunder to a third person claiming under a fraudulent sale under a mistake of law; and that a decree settling the rights of the plaintiff and such third person, furnishes no element of estoppel that can be invoked by the defendant in this action. *Scammon v. Conn. Union Assurance Co.*, 74

4. A condition in a policy of insurance providing for a forfeiture in case of the fall of the building insured, will not be construed as working

INSURANCE. *Continued.*

a forfeiture upon the fall of a part of the building. *Security Ins. Co. v. Mette*, 324

5. Where the building insured is on leased land, a failure to disclose such fact will work a forfeiture under a condition requiring it to be written in the policy. *Id.*, 324

6. In the case presented, the broker who procured the insurance in question acted as the agent of the assured. The mere delivery of the policy and payment to him of a commission did not constitute him the agent of the defendant. *Id.*, 324

7. The employment of an adjuster by the defendant before it knew the plaintiff's title was not a waiver of the condition as to title. *Id.*, 324

8. In an action on a policy of fire insurance, it is held: That the question, whether the policy was revived or continued in force after a forfeiture is unimportant, the plaintiff having failed to charge the defendant with notice of such facts as would prevent a forfeiture under the condition as to title; and that the broker who procured the insurance in question acted as the agent of the assured. *Ill. Mut. Ins. Co. v. Mette*, 330

9. Where wearing apparel which is described in the policy of insurance as contained in a certain building, is destroyed several months after its removal from its ordinary place of deposit to a place where the owner is for the time being residing, it is not covered by the policy. *Tuen v. Fire Ass'n of Philadelphia*, 433

10. The ordinary use of wearing apparel in such cases does not include the use involved in long journeys, or protracted visits, during which it may be exposed to risks not contemplated by the insurer. *Id.*, 433

11. Where the agent of an insurance company knew that a house was vacant when it was insured, the company can not claim a forfeiture under the clause providing that the policy should be void in case of vacancy. *Germania Life Insurance Co. of N. Y. v. Klewer*, 590

12. An insurance policy providing against other insurance is not affected by a former policy which has become void by reason of the vacancy of the premises. *Id.*, 590

INTEREST—See APPEAL AND ERROR, 17.

JUDGMENTS AND DECREES—See ASSIGNMENTS, 3, 4; CORPORATIONS, 12; EVIDENCE, 9, 11; FORCIBLE ENTRY AND DETAINER, 3; INJUNCTIONS, 1; LANDLORD AND TENANT, 2; PRACTICE, 14; REAL PROPERTY, 1.

1. The practice of entering judgment by confession upon warrant of attorney without process in actions of tort did not obtain at common law. *Willer v. French*, 76

2. Where a defendant in a suit at law has neglected to make his defense, he can not have relief in equity from a judgment which includes usurious interest. *Sulliran v. Niehoff*, 421

JURISDICTION—See ACTIONS, 3; FORCIBLE ENTRY AND DETAINER, 2; INJUNCTIONS, 4; REMOVAL OF CAUSES, 1, 2; WAIVER, 1.

1. This court has no jurisdiction of an appeal from an order staying proceedings on an original bill, until the issues should be made upon a cross-bill, and until the further order of the court. *Curtis v. Williams*, 311

2. Such an order is not an injunction within the meaning of the act of June 14, 1887. *Id.*, 311

3. This court dismisses, for want of jurisdiction, an appeal from an order of the County Court directing an assignee to execute and deliver a quit claim deed of certain real property. *Davis v. Chicago Dock Co.*, 569

JUSTICES—See PRACTICE, 7, 8.

LANDLORD AND TENANT—See FORCIBLE ENTRY AND DETAINER; INJUNCTIONS, 2.

1. Where a lease contains a covenant on the part of the lessee not to assign without the lessor's assent, an assignment with such assent does not discharge the liability of the guarantor, although such assignment was without his knowledge. *Dietz v. Schmidt*, 114

2. In the case presented, it is *held*: That an agreement between the lessor and the guarantor that the question of the liability of the latter should abide the final judgment in a certain suit, contemplated a judgment rendered on the merits. *Id.*, 114

3. While all the different occupants of premises included within a single lease may be joined in an action of forcible entry and detainer, the recovery against an individual defendant must be limited to such portion of the premises as is actually withheld by him. *Humphreille v. Davis*, 142

4. The insertion in a lease of the number of the house intended to be demised is proper, although by parol authority. *Bulkley v. Lerine*, 145

5. Where a lessee in possession makes valuable improvements with the knowledge of the lessor, and on the faith of an oral promise by the latter to execute a lease extending the term, the making of such improvements constitutes such part performance as will take the case out of the statute of frauds. *Morrison v. Herrick*, 339

6. In such a case a bill lies for a specific performance of the oral agreement for a lease. *Id.*, 339

7. In the case presented, a demurrer to the cross-bill filed by subsequent lessees was properly sustained. *Id.*, 339

8. The possession of a tenant is constructive notice of his rights to a subsequent lessee. *Id.*, 339

9. In an action to recover damages for overloading and breaking down the plaintiff's building, while occupied by the defendants as tenants, it is *held*: That an instruction which ignored the question of notice of structural weakness, if any, was improperly given; that an instruction asked by the defendants was improperly modified so as to require them to show affirmatively that the fall was not due to their

LANDLORD AND TENANT. *Continued.*

negligence; that certain other instructions were defective; and that the defendants had the right to have submitted to the jury the question whether the plaintiff, her agent, or other tenants, had exercised due care in loading the building. *Sheer v. Fisher*, 464

10. A tenant is only liable for causing a permanent injury to the demised premises over and above the ordinary wear and tear, when such injury is caused by his wrongful act or negligence. *Id.*, 464

11. In an action by a tenant to recover rent from sub-tenants, it is held: That the question whether there was an agreement for the cancellation and surrender of the lease was a question for the jury, and that there was no such destruction of the rooms leased by defendants as would operate to determine the lease, even if their destruction would have that effect. *Turner v. Mantonya*, 500

12. Where a lease has been terminated by notice and an action of forcible detainer successfully prosecuted, the landlord can not maintain an action for installments of rent which would have become due had the lease continued in force. *Johannes v. Kielgast*, 576

13. In the case presented, the covenant to pay rent did not continue in force after the lease was terminated by notice and pending the action of forcible detainer. *Id.*, 576

LIBEL AND SLANDER.

1. Words spoken of one in his office, trade, profession or business, which tend to impair his credit, or charge him with fraud or indirect dealings, or with incapacity, and that tend to injure him in his trade, profession or business, are actionable without proof of special damages. *McDonald v. Lord & Thomas*, 111

2. A letter stating that the writers have been applied to by an advertising agent to insert in a certain paper the advertisement of the person addressed and have had to decline it, but will be glad to receive it "direct, or through any responsible agency," conveys the idea that the agency in question is not responsible. *Id.*, 111

3. In an action for slander, where the declaration contains words, some of which are, and some of which are not, slanderous *per se*, it is error to instruct the jury that, in order to entitle the plaintiff to recover, it is sufficient to prove the slanderous words in some one or more of the statements contained in the declaration. *Roby v. Murphy*, 394

4. It is error to leave the jury to determine what words are slanderous, that question being for the court. *Id.*, 394

5. The words "bitch" and "slut," where applied to a woman, and taken in their common acceptation, are not actionable *per se*. *Id.*, 394

LICENSES—See BROKERS, 1, 2.

1. Where one engaged in the sale of spirituous liquors fails to take out the required license, he does not become indebted to the city for the amount of the license fee. *City of Chicago v. Enright*, 559

LIENS—See EQUITY, 2, 3; FACTORS, 1, 2, 3.

1. An attorney is entitled to a lien for a general balance of account

LIENS. *Continued.*

on papers which have come into his hands in the course of his professional employment. *Sanders v. Serige*, 288

2. In the case presented, it is *held*: That certain letters and the action of the parties, constituted a contract for services in the Appellate Court only; that the appellees are entitled to a lien on the bonds in question for their fees for services in the Supreme Court; and that the evidence is sufficient to sustain the allowance by the court below. *Id.*, 288

LIMITATIONS—See ACTIONS, 3.

1. An additional count in which the plaintiff's cause of action is merely restated does not warrant plea of the statute of limitations, although filed after the time limited for the commencement of the suit. *Blanchard v. L. S. & M. S. Ry. Co.*, 22

2. There may be a contract in writing although it contains no express promise to pay the consideration. Where a state of facts is acknowledged in writing to exist, which imports an obligation to pay, the law implies a promise, but the contract is not thereby reduced to parol. *Ames v. Mori & Co.*, 88

3. The limitation provided in ¶ 375, Criminal Code, applies only to criminal prosecutions by indictment or otherwise. It has no application to a proceeding to collect a penalty. *City of Chicago v. Enright*, 569

4. The statute of limitations begins to run from the dissolution of a partnership as to an action to settle the partnership accounts. *Richardson v. Gregory*, 621

MALICIOUS PROSECUTION.

1. Where a person arrested for embezzlement is discharged because of a compromise, and not because of his innocence, there is no foundation for an action for malicious prosecution. *Fadner v. Filer*, 506

2. In action of trespass on the case for causing the arrest of the plaintiff for embezzlement, the complaint having been made by the defendant upon his personal knowledge, it seems to be doubtful whether evidence that he had information that the plaintiff had been charged with an arrest for larceny, embezzlement or forgery is admissible. It seems that such evidence, if admitted, should have reference to matters of recent date, and that it should have been relied upon. *Id.*, 506

3. Whether the advice of counsel is a complete defense in an action for malicious prosecution is a question for the jury. *Id.*, 506

4. It is improper to instruct the jury that actual guilt and probable cause must concur to constitute a defense in an action for malicious prosecution. *Id.*, 506

5. In the case presented, it is *held*: That the verdict for \$3,000 was extravagant and unwarranted, and that it should be set aside, although there was a *remittitur* of \$2,000 by the plaintiff. *Id.*, 506

MANDAMUS—See RAILROADS, 4.

1. A writ of *mandamus* will not be awarded unless the petition shows on its face a clear right to have the thing sought by it done,

MANDAMUS. *Continued.*

and by the person or body sought to be coerced. *People v. City of Chicago*, 217

2. The court exercises a discretion in granting or refusing the writ. *Id.*, 217

3. Upon a petition for a *mandamus* to compel the city of Chicago to lower a certain sidewalk, it is *held*: That the petitioner can claim no right under an ordinance not set out in the petition; that the time when, the place where, and the body by whom the alleged ordinance was passed, with a recital of so much of it as was material, should have been stated in the petition; and that the time when the walk was built should also have been stated. *Id.*, 217

MASTER AND SERVANT.

1. The master is liable for a personal injury caused by the negligence of a third person in piling lumber handed him by a servant of the master for that purpose, although the service performed by such third person was voluntary and without compensation. *Andrews v. Boedecker*, 30

2. In the case presented, it is *held*: That the relation of master and servant, as respects the rights of third persons, was established when such volunteer was allowed to assist in the defendant's work; and that the motive which induced him to perform gratuitous service is unimportant. *Id.*, 30

MECHANIC'S LIEN.

1. The Supreme Court, having remanded a case involving mechanic's liens, improperly decreed by the court below, for this court to consider other errors assigned, it is *held*: That the decree should stand affirmed except as to so much of each as declares a lien and renders judgment *in personam* against the defendant. *Swift v. Martin*, 117

2. Where an original contractor has failed to complete his contract and a sub-contractor claims a lien under Sec. 45 of the statute, the petitioner is not required to set out the original contract, nor allege that there is anything due the original contractor. *Doyle v. Munster*, 130

3. Where a contract for labor and materials to be used in the erection of a building requires a certificate from the architect before each installment becomes due, a bill for a mechanic's lien can not be maintained, unless it appears that such stipulation has been complied with, waived or excused in some manner recognized by law. *Wolf v. Michaelis*, 336

4. In the case presented, in the absence of any allegation that the architect ever issued or refused to issue the certificates required, or statement of any matter of excuse for failure to secure such certificates, the evidence touching the question was improperly admitted. *Id.*, 336

5. Upon appeal from a decree for a mechanic's lien, it is *held*: That it may be fairly inferred from the evidence that the appellant, the owner of the premises, and her husband, made one of the contracts in question, and that the husband acting as the wife's agent made the other of said contracts. *Watson v. Carpenter*, 492

MECHANIC'S LIEN. *Continued.*

6. The notice required by Sec. 30, Chap. 82, R. S., should be dated and signed by the person claiming a mechanic's lien. Without signature the notice is fatally defective. *Wetenkamp v. Billigh*, 585

7. In the case presented, it is *held*: That the contract for the erection of the building constituted the mason and carpenter joint contractors; that parol evidence is inadmissible to show a different intention; and that a paper subsequently signed by the owner only, can not be regarded as a contract. *Id.*, 585

MORTGAGES—See FORMER ADJUDICATION, 2; TRUST DEED.

1. In the case presented it is *held*: That a strong presumption arises that the former relation between the parties of mortgagor and mortgagee was terminated by the foreclosure proceedings; that the testimony to overcome such presumption must be strong, positive and convincing; and that the evidence does not sustain the contention of the complainant that such arrangement was continued by parol agreement made pending such proceedings. *Windett v. Conn. Mut. L. Ins. Co.*, 68

2. Parol evidence to establish a deed absolute on its face as a mortgage must be clear and convincing. *Strong v. Strong*, 148

MUNICIPAL CORPORATIONS—See BROKERS, 1, 2; EVIDENCE, 20; EXPLOSIVES, 1; INJUNCTIONS, 5; MANDAMUS, 3; RIPARIAN RIGHTS.

1. A municipal corporation, incorporated under the general law, is liable to any party injured, while exercising ordinary care, by reason of a breach of its duty to keep its streets and sidewalks in a reasonably safe condition for traveling in the ordinary modes. *Village of Jefferson v. Chapman*, 43

2. A municipal corporation can not escape liability for an injury caused by the use of defective material in restoring a cross-walk over a ditch, on the ground that the work was done by an independent contractor, if the removal of the walk was a necessary incident of the work which he was directed to perform. *Id.*, 43

3. Where it is sought to hold a municipal corporation liable as the direct author of the nuisance complained of, notice by lapse of time or otherwise is unnecessary. *Id.*, 43

4. This court affirms a decree dismissing a bill filed by a gas company to enjoin a municipal corporation from interfering with the complainant in laying gas pipes in its streets, there being a failure of performance on the part of the complainant within the time limited in the ordinance granting it the right to lay such pipes. *Chi. Gas Light & Fuel Co. v. Town of Lake*, 346

5. Upon a bill filed by a gas company to enjoin a municipal corporation from preventing the complainant from laying gas pipes in the defendant's streets, it is *held*: That the threat on the part of the defendant to use force to prevent the laying of pipes by the complainant, is sufficient to justify the interference of the court, if the complainant is otherwise entitled to relief; that the complainant was justified in not applying for a permit to lay its pipes; that the ordinance in question

MUNICIPAL CORPORATIONS. *Continued.*

was a valid grant to the complainant of the right to lay its pipes in the defendant's streets and furnish gas to its inhabitants; that said ordinance was accepted and acted upon by the complainant within a reasonable time; that no formal acceptance of the ordinance was necessary, acts done upon its faith, in furtherance of its purpose, by virtue of it and known by the defendant to have been so done, being sufficient to operate as an acceptance; that the acts of the complainant must be regarded, under the evidence, as done in good faith; that the ordinance and its acceptance constituted a valid contract between the parties, which was not affected by the attempted repeal of the ordinance; and that the case is not affected by a former ordinance granting exclusive privileges to another company. *Metropolitan Gas Co. v. Village of Hyde Park.*

361

6. In an action against a municipal corporation to recover damages for personal injuries, alleged to have been caused by negligence in failing to have a guard or rail on a sidewalk adjoining a bridge, this court affirms the judgment for plaintiff, it being admitted that the evidence tended to show constructive notice, and the instructions asked by the defendant and refused by the court having failed to present a sound hypothesis upon which to base a verdict for the defendant. *City of Chicago v. Farrell,*

526

NEGLIGENCE—See INSTRUCTIONS, 18, 20; LANDLORD AND TENANT, 9, 10; PERSONAL INJURIES, 1-3; RAILROADS, 1.

1. It is for the jury to say what conduct, or what acts, constitute care or its opposite. Therefore, answers to requests for special findings as to special acts without finding as to the ultimate facts of care or negligence, are merely surplusage. *C. & N. W. Ry. Co. v. Dunleavy,*

438

NEGOTIABLE INSTRUMENTS—See BANKS, 1, 5.

1. A promissory note given in payment of a subscription, or to satisfy a promise of a subscription, to the funds of a mission church, is upon a valuable consideration. If such note is discounted and the proceeds used for the purpose for which the subscription was given, the maker can not defend on the ground of failure of consideration. *Vierling v. Horton,*

263

2. Warehouse receipts issued by others than those designated by the statute as public warehousemen, have a quasi negotiable character. *Northrop v. First Nat. Bank of Chicago,*

527

3. The assignee of such a receipt without notice is not bound by a verbal arrangement between the parties, touching a claim of the party holding the property. *Id.,*

527

4. In an action of replevin by the assignee of such receipt, the fact that the plaintiff holds other securities can not be urged in defense. *Id.,*

527

NEW TRIAL—See PRACTICE, 9, 25.

1. Newly discovered evidence which is merely cumulative is not sufficient as a ground for a new trial. *Cooper v. Johnson,*

504

NEW TRIAL. *Continued.*

2. On a motion for a new trial based on the absence of witnesses who had been subpoenaed, the failure of the party calling them to show whether such witnesses absented themselves by his consent, is sufficient ground for refusing a new trial. *N. C. City Ry. Co. v. Gastka*, 518

NOTICE—See FACTORS, 2; LANDLORD AND TENANT, 8.

PARTIES—See LANDLORD AND TENANT, 3; PRACTICE, 5, 12, 14, 31; TRUST DEEDS, 1, 2.

1. Where a joint verdict against two defendants must be set aside as to one of them, it can not stand as to the other. *McGillis v. Bishop*, 53

PARTNERSHIP—See CONTRACTS, 1; LIMITATIONS, 4; PRACTICE, 16, 19.

1. In an action to recover fees for legal services, this court affirms the judgment for the plaintiff, although it appears that he had a partner when the services in question were rendered, there being nothing to show that the latter was to share in the compensation for such services. *James T. Hair Co. v. Thorne*, 502

2. A specific agreement is not necessary to terminate a partnership; words and acts implying such intention are sufficient. *Richardson v. Gregory*, 621

PENALTIES—See ACTIONS, 1, 2.

PERSONAL INJURIES—See EVIDENCE, 20; DOGS, 1, 2; INSTRUCTIONS, 6; MASTER AND SERVANT, 1, 2; MUNICIPAL CORPORATIONS, 1, 2; RAILROADS.

1. In an action against a street railway company to recover damages for causing the death of a child, it is *held*: That the court properly overruled a motion to instruct the jury to find for the defendant; and that the questions whether the deceased was in the exercise of reasonable care and whether the defendant was guilty of negligence, were for the jury. *Chicago City Ry. Co. v. Robinson*, 26

2. It is ordinarily a question for the jury whether, under the circumstances of the particular case, a failure to stop until the view is clear and look for an approaching train is such negligence as should defeat a recovery. *Id.*, 26

3. Where the child injured is in the exercise of ordinary care the question whether the parent was negligent does not arise. *Id.*, 26

4. In an action by an employe against his employer, to recover damages for injuries alleged to have resulted from a dangerous act out of the scope of his employment, which he was ordered to perform by the defendant's foreman, while employed in another State, it is *held*: That the issues of fact involved were fairly submitted to the jury; that the court properly refused to give an instruction stating the law of the State in which the plaintiff's injuries were received; and that the special findings were not inconsistent with the general verdict for the plaintiff. *C. & N. W. Ry. v. Johnson*, 351

5. Where one is injured by falling into an elevator shaft in a portion of a meat market, which is not open to the public, he can not

PERSONAL INJURIES. *Continued.*

recover damages therefor unless he entered such part of the premises upon express or implied invitation. *Turner v. Klehr*, 391

6. In the case presented the question whether it was proper for the plaintiff to go to the place where he was injured except upon invitation, was not submitted to the jury by the instructions given. *Id.*, 391

PHARMACY.

1. Where a registered pharmacist is employed and placed in charge of a drug store, he becomes personally liable for the statutory penalty if he permits one who is not a registered pharmacist, as assistant, to vend drugs, medicines or poisons in his store. *Hass v. The People*, 416

2. An instruction to a boy to sell anything in a drug store except poisons, leaving him to judge what are poisons, is a violation of the statute. *Id.*, 416

PLEADING—See APPEAL AND ERROR, 20; DIVORCE, 1; FRAUD, 3; LANDLORD AND TENANT, 7; TRUST DEEDS, 2; VARIANCE, 1.

1. Where the justification of a trespass is under a writ, warrant or other process of a court of record, and it is claimed that the defendant has been guilty of any illegal conduct or undue violence, the plaintiff should reply the facts or new assign Matter showing that the defendant by subsequent misconduct became a trespasser *ab initio* should be specially replied. *McGillis v. Bishop*, 53

2. A copy of an instrument is no part of the declaration to which it is attached. *Gossett v. Union Mut. Ac. Ass'n*, 266

3. In an action on a certificate of membership in a mutual accident association, it is *held*: That the demurrer to the declaration containing the common counts, was improperly sustained; that allegations in two of the special counts that the membership in the association was sufficient to make the amount named in the certificate by the payment of two dollars each, reduced to certainty that which would have been uncertain; and that the special counts are sufficient. *Id.*, 266

PLEDGES.

1. The pledge of a warehouse receipt as collateral security for a note is in legal effect a sale to the pledgee, for a valuable consideration, of the property called for by the receipt, and vests in him the legal title thereto. *Hanchett v. Buckley*, 159

POWERS.

1. A power conferred upon a party adverse in interest, or upon a third person who acts at the instance of such party, must be strictly pursued. *National Bank of Ill. v. Baker*, 356

2. The fact that collateral securities are not what they purport to be but are of less value and in part fraudulent, does not justify a sale under a power authorizing a sale upon their depreciation in value. *Id.*, 356

3. In the case presented, it is *held*: That the power of sale only applied to events then in the future; that the fraud in question did not enlarge the power; that the sale was unauthorized; and that the utmost claim of the purchaser is to be subrogated to the position of the vendor, holding the policy of insurance as security for the payment of the original indebtedness. *Id.*, 356

PRACTICE—See APPEAL AND ERROR; NEW TRIAL, ASSIGNMENTS, 7, 8; DIVORCE, 2; COSTS, 1; BILLS OF REVIEW, 1; ATTACHMENT, 3; APPEAL AND ERROR; EQUITY, 2, 3; SALES, 4.

1. The court may, in its discretion, confine counsel within reasonable limits in the cross-examination of witnesses. *Birmingham F. Ins. Co. of Pitts. v. Pulver*, 17

2. The record can not be amended from the judge's knowledge, but only from his minutes, after the expiration of the term. *In re Annie Barnes*, 151

3. Where an action commenced before a justice with an affidavit of claim is appealed to the Circuit Court, the defendant is not required to file an affidavit of merits until the cause is reached for trial. *Martin v. Hochstadter*, 166

4. Where the appellee has joined in the errors assigned, this court has jurisdiction, although the appeal might have been confined to narrower issues. *Id.*, 166

5. A bill should not be dismissed for want of equity, where there is merely a defect of parties. *Stelzich v. Weidel*, 177

6. Where an action, commenced before a justice with an affidavit of claim, is appealed to the Circuit Court, the defendant is not required to file an affidavit of merits until the cause is reached for trial. *World's Mfg. Co. v. Woltz*, 302

7. In an action before a justice of the peace, if the plaintiff or his agent does not appear, the justice must dismiss the suit, unless the defendant consents to a continuance. The rule is imperative, and the case is not altered by the fact that the defendant claims a set-off. *Cunningham v. Wright*, 334

8. Where, in the absence of the plaintiff, the justice has entered judgment for the defendant, and the latter has filed a transcript in the office of the clerk of the Circuit Court, a motion to quash an execution issued thereon and release a levy thereunder will be granted. *Id.*, 334

9. Where a party desires to have requests for special findings more fully answered by the jury, he should move the court to send them back for that purpose. In the absence of such a motion he can not assign a failure to answer certain questions as a ground for a new trial. *C. & N. W. Ry. v. Johnson*, 351

10. Where a case is tried without a jury, and no propositions of law are submitted to be held by the court, it will be presumed that all questions of law were correctly decided. *Davis v. Phillips*, 357

11. In such a case, if the evidence is conflicting, and the finding of the court below is not manifestly against its weight, such finding is conclusive upon this court. *Id.*, 357

12. Where two or more are sued jointly *ex contractu*, the recovery must be against all or none of the defendants. *Brown v. Tuttle*, 389

13. After a default by one of two defendants who have been sued jointly *ex contractu*, the plaintiff can not discontinue as to the other and so amend the declaration as to change a joint liability to a several and individual one, and then enter judgment without notice against the defendant who has suffered a default. *Id.*, 389

PRACTICE. *Continued.*

14. After such material amendment a refusal to allow the remaining defendant to plead to the declaration as amended, is error. *Id.*, 389
15. Upon the reversal of a decree by this court for defect of parties and the filing of a supplemental bill to cure such defect, a new decree on the merits is necessary. *Lambert v. Hyers*, 400
16. Under a rule to plead by a day fixed, it is sufficient to plead after the day so fixed, if it is done before default is asked. *Id.*, 400
17. In an action seeking to charge two or more defendants as partners, Sec. 35, Chap. 110, R. S., only relieves the plaintiff from the burden of proving joint liability "in the first instance," and leaves the defendants at liberty to disprove it without first denying it by plea. *Benley v. Brockway*, 410
18. In such a case, where the plaintiff discontinues as to certain of the defendants, it is error to deny a motion to strike out evidence previously admitted of admissions by one of them to charge the defendants as partners. *Id.*, 410
19. In the case presented, the court should have allowed the remaining defendants to file a plea of set-off after the discontinuance as to the others. Prior to that time they could not plead a set-off due to themselves only. *Id.*, 410
20. It seems to be unnecessary to change the pleadings upon a discontinuance as to part of the defendants, whom it is sought to charge as partners in an action *ex contractu*. *Id.*, 410
21. Requests for special findings which require the jury to answer merely as to acts or omissions which may or may not, in their opinion, be evidence of care or negligence, and from their answers to which, either way, the court can not say as matter of law whether care or negligence is the result, are not material within the meaning of the statute. *C. & N. W. Ry. v. Dunleavy*, 438
22. Complaint of irregularity by the Circuit Court in dismissing an appeal from a justice for want of prosecution, is too late when made at a subsequent term. *Hunt v. Baldwin*, 446
23. An appeal by part of the defendants from a justice's judgment, when the appeal is perfected by filing a bond with the clerk of the Circuit Court, does not stand for trial until the other defendants have been brought in, or have entered their appearance. *Fergus v. Lohman*, 448
24. It is improper, in such a case, to dismiss the appeal for want of prosecution, until all the defendants have thus become subject to the jurisdiction of the court. *Id.*, 448
25. In an action to charge two defendants, husband and wife, jointly, for commissions on the sale of certain real estate, it is *held*: That the plea of the general issue relieved the plaintiff from the burden of proving the joint liability of the defendants in the first instance; and that the evidence on the part of the defendants fails to disprove joint liability. *Touhy v. Daly*, 459
26. Upon appeal from a decree granting a divorce, it is *held*: That the court properly refused to admit evidence touching a defense not

FIRST TIME. Continued.

held to be answers; and that the defendant is not entitled to a new trial on the ground of newly discovered evidence. *Carpenter v. O'Connell*. 457

27. In an action against a telegraph company to recover damages for a failure to send a telegram, it is held: That the question whether the plaintiff assented to a printed notice on the back of the telegram for damages to be presented within sixty days, and whether the claim was presented within the time so limited, were for the jury; and that, although the verdict appears to be excessive, this court can not reverse on that ground, as the question was not raised in the court below. *U. Tel. Co. v. DeGolyer*. 462

28. This court affirms an order denying a motion to set aside an order dismissing an appeal from a justice of the peace for want of prosecution, the affidavit in support of such motion being merely an information and to the effect that the appellant's attorney was ill and had been for a long time unable to attend to business, at the time of such dismissal. *Thomas v. Kelly*. 491

29. The showing made in support of a motion to set aside an order dismissing an appeal for want of prosecution, will be strictly scrutinized. *Id.*, 491

30. Upon the failure of appellant to file his briefs within the time required by the rule of this court, the motion to strike such briefs from the files and affirm the judgment should be made, if practicable, before the case is reached for argument. *Goudy v. City of Lake View*. 505

31. Where the decisions of the Supreme Court are conflicting, this court is bound by the latest of them. *Bites v. Sandy*. 552

32. The non-joinder of one of the defendants in the Circuit Court, on appeal from a justice, can not be assigned for error after a trial on the merits without objection to such non-joinder. *Id.*, 552

33. Where, in an action of debt on a replevin bond, the bond is stated in legal effect in the declaration, it is unnecessary to prove its execution, unless it has been denied by plea verified by affidavit. *Horne v. Boyden*, 573

34. The change by the plaintiff of an action of replevin, brought to recover goods alleged to have been obtained by fraud, to an action of assumpsit, operates to affirm the sale as to all the goods in question, and the plaintiff can not thereafter defend an action on the replevin bond on the ground of fraud in the purchase of the goods. *Id.*, 573

PRINCIPAL AND SURETY—See BONDS, 1, 2.

RAILROADS.

1. In an action against a railroad company to recover damages for causing the death of the plaintiff's intestate, wherein this court upon a former appeal adjudged the plaintiff to have been a trespasser, it is held: That the evidence fails to show negligence on the part of the defendant so great as to amount to wanton and wilful misconduct; and that the court properly directed a verdict for the defendant. *Blanchard v. L. S. & M. S. Ry. Co.*, 22

RAILROADS. *Continued.*

2. In an action against a railroad company to recover damages for injuries to himself and to his horse and wagon at a highway crossing this court affirms the judgment of the court below, the verdict being fairly supported by the evidence and there being no substantial error committed by the court. *C., M. & St. P. Ry. Co. v. Maher*, 24

3. A railroad company can not discontinue an established switch connection with a coal mine merely because the cars of another company may be taken upon its line over such switch, thereby endangering its property and the lives of its passengers and employees. *C. & A. Ry. Co. v. Suffern*, 404

4. Where a switch connection has been so discontinued a petition for mandamus lies to compel its restoration. *Id.*, 404

5. This court affirms a judgment against two railroad companies for damages for causing the death of a conductor who was in the employ of one of the defendants, two juries having found the same verdict and there being no substantial error in the record. *C., M. & St. P. Ry. Co. v. Snyder*, 416

6. In an action against a railroad company to recover damages for causing the death of a workman while he was engaged in repairing a viaduct over the defendant's track, it is *held*: That certain instructions were properly refused; and that the defendant had no right to run its trains at any rate of speed, at the point and time in question, without warning to those rightfully engaged in repairing said viaduct. *C. & N. W. Ry. Co. v. Dunleavy*, 433

7. Although the conductor of a street car has implied authority to keep trespassers off the car under his control, he is bound to have due regard for life and limb. His employer will be held to a strict accountability for any reckless or wanton abuse of his authority. *N. C. City Ry. Co. v. Gastka*, 518

RATIFICATION—See AGENCY, 4.

REAL PROPERTY—See ASSIGNMENTS, 4, 5; BROKERS, 3, 4; CONTRACTS, 3, 4; EVIDENCE, 21, 22; FORCIBLE ENTRY AND DETAINER; FORMER ADJUDICATIONS, 5, 6; JURISDICTION, 3; LANDLORD AND TENANT; MORTGAGES.

1. Upon a bill to remove a cloud from the title to certain real estate caused by a contract of sale, it is *held*: That the decree should have required to be kept good an offer contained in the bill to return a payment on the purchase price to the vendee; and that it was improper to give the clerk of the court authority to decide what were the existing liens and incumbrances, and to pay the same, if the vendee should avail himself of the provision of the decree directing him to pay the balance of the purchase money to the clerk and take a conveyance of the premises to himself. *Wislar v. Herting*, 443

RECORDERS.

1. Prior to the acts of May 31 and June 16, 1887, persons engaged

RECORDERS. *Continued.*

in the business of making abstracts of title to real estate were not entitled to have access to original instruments and to books of records in the recorder's office, to make abstracts thereof for purposes of their business. *Scribner v. Chase*, 36

2. This court is of the opinion that a resolution of the board of commissioners of Cook County, directing the recorder to deny the use of his office to all abstract firms, companies and corporations, for the purpose of making abstracts, was unauthorized and void. *Id.*, 36

REMITTITUR—See APPEAL AND ERROR, 17; DOGS, 2; MALICIOUS PROSECUTION. 5.

REMOVAL OF CAUSES.

1. A State court loses jurisdiction of a removable cause upon the entry of an order of removal, and can only re-acquire jurisdiction through an order of the Federal court remanding the cause under Sec. 5, Act of March 3, 1875. *Kramer v. Ferry*, 479

2. Failure to file a transcript of the record in the Federal court does not operate to re-invest the State court with jurisdiction. Hence a certificate of the clerk of the Federal court to such failure, even if a part of the record, does not authorize the State court to proceed with the cause. *Id.*, 479

REPLEVIN—See NEGOTIABLE INSTRUMENTS, 4; PRACTICE, 33.

1. Where there has been a breach of a replevin bond, any person injured may maintain an action thereon in the name of the sheriff to his own use. *Hanchett v. Buckley*, 159

2. In an action on a replevin bond wherein it is claimed that the action of replevin was not tried on its merits and that a certain bank, one of the parties for whose use the action is brought, became the purchaser of the property in question by accepting a warehouse receipt as collateral, it is held: That the burden was on the plaintiff to show that the bank had notice of the fraud in the original purchase; that certain of the instructions were erroneous; that it was unnecessary to prove that a *retorno habendo* had been awarded, it being admitted by the pleadings; and that evidence as to whether the note secured was presented to the indorser and whether he was worth the amount thereof, was improperly admitted. *Id.*, 159

3. In an action on a replevin bond, this court affirms the judgment of the court below, the evidence as to value being conflicting and the jury having been properly instructed. *Eggers v. Hanchett*, 429

4. In an action of replevin, a judgment in trover for the conversion of part of the goods in question is not supported by a verdict which fails to find the ownership of the property. *Hewes v. Wall*, 445

RESCISSION—See CONTRACTS, 5.

RESTRAINT OF TRADE—See CONTRACTS, 6.

RIPARIAN RIGHTS.

1. A municipal corporation can not maintain a bill to enjoin the erection of a building or buildings on premises occupied by a wharf

RIPARIAN RIGHTS. *Continued.*

which is alleged to extend into a navigable stream, on the ground that the complainant may, at some future time, condemn the premises, or part thereof, for the construction of a bridge. *City of Chicago v. Reed*, 482

2. In the case presented, as the bill does not attack nor seek to disturb the actual occupation of the premises for purposes of a wharf, it must be presumed that such occupation is proper. *Id.*, 482

SALES—See FACTORS, 2; FRAUDS; POWERS, 2, 3.

1. A contract for the sale of a stock of goods, "to be invoiced at cost and as agreed upon," does not justify a rescission because of the failure of the vendor to produce the original bills of certain of the goods on demand. *Kendal v. Young*, 174

2. In the case presented, an instruction to the effect that it was the duty of the vendor on the request of the vendee to furnish such evidence of cost as merchants in the same line of business usually have, was erroneous. *Id.*, 174

3. Where a sale is actually intended, and is made in the usual course of business, an invoice, or other instrument, which specifies and enumerates the property sold, may be substituted for a bill of lading in constituting a symbolical delivery. *Hunter v. Mathewson*, 192

4. In an action to recover the price of certain regulators for gas lamps, manufactured and delivered after the order for them was countermanded, the trial below having been by the court, it is held: That, if the contention of the defendant that a continuation of the test upon which the order and warrant were based resulted in failure, is well founded, the defendant was justified in rescinding the order; and that, in the absence of a finding of facts contrary to such contention and in favor of plaintiff, the court erred in refusing to hold a proposition of law based upon the hypothesis of the defendant. *Siemens-Lungren Gas Illuminating Co. v. Francis*, 303

5. In an action to recover the contract price of a safe, wherein the defendant contends that the door was so defective as to render the safe useless, this court holds that an instruction based upon this hypothesis, but ignoring the question of notice and the contention of the plaintiff that the defendant failed to close the door properly, was improperly given. *Chicago Safe & Lock Co. v. Cremen*, 331

6. In an action to recover the purchase price of cattle bid off by the defendant at an auction sale, an alleged rescission of the sale being the issue presented, it is improper so to instruct the jury as to throw on the plaintiff the burden of showing that he still keeps the cattle ready for delivery to the defendant. *Chamberlain v. Bain*, 634

7. An auction sale is not executory, but is completed when the property is knocked down to the purchaser. *Id.*, 634

8. What will, or will not, amount to a sale, is a matter of fact to be determined from the evidence, and depends upon the intention of the parties to the transaction. *Gould v. Warne*, 651

SET OFF—See PRACTICE, 18.

SHERIFF—See TRESPASS, 2.

SLANDER—See LIBEL AND SLANDER.

SPECIAL FINDINGS—See PERSONAL INJURIES, 4; PRACTICE, 9, 20.

SPECIFIC PERFORMANCE—See LANDLORD AND TENANT, 6.

STATUTES.

1. Where general words in a penal statute follow an enumeration of particular cases, such words are held to apply only to cases of the same kind as those expressly mentioned. *Marquis v. City of Chicago*, 2:1

STATUTE OF FRAUDS—See CONTRACTS, 7; LANDLORD AND TENANT, 5.

STATUTE OF LIMITATIONS—See LIMITATIONS.

SUBROGATION—See POWERS, 3.

TAXES—See EQUITY, 1.

1. A sale of lands for taxes is invalid unless the county clerk has made the certificate to be entered of record as required by Sec. 194, Chap. 120. R. S. To make the sale valid there must be a valid precept. *Sankay v. Seipp*, 299

2. Where a tax certificate has been issued on an illegal sale of land for taxes, a court of equity has jurisdiction of a bill to remove the cloud on the title. *Id.*, 299

3. Upon the remanding of the cause the court below may deal with deeds issued on the certificates in question pending this proceeding. Such deeds are of no higher validity than the certificates. *Id.*, 299

TELEGRAMS—See PRACTICE, 26.

TENDER.

1. Where the agreements between contracting parties are mutual and dependent, neither party without a tender of performance can demand performance of the other. To maintain an action for the recovery of the purchase price of an article agreed to be sold by such a contract, it is necessary to aver and prove performance or tender of performance by the plaintiff. Mere readiness to perform is insufficient to support the action. *Plumb v. Taylor*, 238

2. In the case presented, it is *held*: That the delivery of the railroad stock in question to a trustee in escrow, was not a tender to the defendant nor a full performance on the part of the plaintiffs; that, upon the expiration of the trust, the defendant was under no obligation to take the necessary steps to procure possession from the trustee; that there was no such renunciation on the part of the defendant as to render a tender unnecessary; and that it does not appear that there was an assignment from the receiver of the firm of which certain of the plaintiffs were members. *Id.*, 233

TORTS.

1. The keeping of explosives unsafely guarded in such quantities as to be dangerous to persons and property, in such a place and under such circumstances as to threaten calamity to the persons and property

TORTS. *Continued.*

of others, the consequence being an explosion which causes damages to the person or property of another, gives a right of action for such damages as would not have happened in the absence of such explosives. *Wright v. C. & N. W. Ry. Co.*, 200

2. Where a number of causes and results intervene between the first wrongful cause and the final injurious consequence, which are such as might, with reasonable diligence, have been foreseen, the last as well as every intermediate result is to be considered as the proximate result of the first wrongful cause. *Id.*, 200

3. In the case presented, it is *held*: That it was a question for the jury whether the damage alleged was the proximate consequence of the act of the defendant in keeping the oils in its building; that evidence tending to prove that the floor of the defendant's building was soaked with oil was improperly excluded; and that the court erred in excluding the plaintiffs' evidence from the jury and in directing a verdict for the defendant. *Id.*, 200

TRESPASS—See EVIDENCE, 9; PLEADING, 1; RAILROADS, 7.

1. Where the declaration states a case of *trespass de bonis asportatis*, the wrongful seizure of the goods and chattels described is the gist of the action, the conversion of the goods alleged being mere matter of aggravation. *McGillis v. Bishop*, 53

2. In an action of trespass against a sheriff and another to recover damages for an alleged wrongful levy on a stock of goods, it is *held*: That the sheriff may justify under an attachment writ regular on its face, although the subsequent proceedings were without jurisdiction because of an insufficient service or a defective return by the sheriff; that the attachment writ and evidence tending to show that the plaintiff was a fraudulent purchaser, were improperly excluded; that the pleadings furnished no foundation for the contention that the sheriff, by turning the plaintiff out and selling the goods under a void execution, became a trespasser *ab initio*; and that evidence touching the value of the good-will of the plaintiff's business was improperly admitted and an instruction thereon improperly given. *Id.*, 53

3. If a fence is in a street, any person may remove it without being guilty of trespass. *Brooke v. O'Boyle*, 384

4. Where the owner of land, having the right to immediate possession, makes entry thereon in a quiet and peaceable manner, or without actual force or violence, he is not liable in trespass to one who has neither the right of property nor to the possession. *Id.*, 334

TROVER—See REPLEVIN, 4.

1. The plaintiff can not recover in an action of trover, unless he had the right to immediate possession of the goods in question at the time of their conversion. *Lapp v. Pinover*, 169

TRUST DEEDS—See AGENCY, 2.

1. The delivery, without a written assignment, of an agreement and trust deed to a third person who has paid the sum secured thereby,

TRUST DEEDS. *Continued.*

at the request of the grantor in the deed, constitutes such third person the equitable assignee thereof and entitles him to maintain a bill for foreclosure. *Stelzich v. Weidel*, 177

2. In the case presented, it is *held*: That the court below should have directed an amendment to the bill so as to make others, who made advances, parties complainant, and the assignor of the agreement and trust deed a party defendant; that the bill should have contained an allegation that the complainant had elected to declare the whole amount secured by the trust deed due; and that the court below improperly dismissed the bill for want of equity. *Id.*, 177

3. Upon a bill to redeem from a sale under a power in a trust deed, it is *held*: That the sale was of a character wholly unauthorized by the power; that it merely amounted to a private sale, though public in form; that the right of complainant to redeem existed in full force when the bill was filed; and that the doctrine of *laches* has no application. *Williamson v. Stone*, 214

4. Where there has been an attempt made in good faith to organize a loan and building association under the laws of this State, and the association has done business as a corporation, one who has borrowed money from it as a corporation *de facto*, can not set up its defective organization by way of defense to a bill for the foreclosure of a trust deed given to secure the payment of the money borrowed. *Payette v. Free Home Association*, 307

5. A provision in a trust deed authorizing the payment of attorney's fees in case of a foreclosure by the trustee, does not sustain a decree including attorney's fees upon a bill filed by the *cestui que trust*. *Id.*, 307

USURY—See JUDGMENTS AND DECREES, 2.

VARIANCE—See APPEAL AND ERROR, 5.

1. When the declaration charges that an explosion which caused the destruction of the plaintiff's property, came from petroleum stored in the defendant's warehouse running along the easterly line of plaintiffs' building, and the evidence introduced by the plaintiffs shows that the defendant's warehouse was south of their building, the variance is fatal. *Wright v. C. & N. W. Ry. Co.*, 200

WAIVER.

1. An objection to the validity of a statute is waived by an appeal to this court. *Chaplin v. Highway Commissioners*, 643

WATERS—See RIPARIAN RIGHTS.

WITNESSES—See CORPORATIONS, 2.

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